

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 19

FRANK ROBERTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI, FILED FEBRUARY 20, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 19

FRANK ROBERTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. a] [Captions omitted]

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**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHEASTERN DIVISION OF THE
NORTHERN DISTRICT OF ALABAMA, OCTOBER
TERM, A. D. 1937**

INDICTMENT FOR VIOLATION OF SECTION 409, TITLE 18, U. S. C.
—Filed February 16, 1938—

Count One

The Grand Jurors of the United States, duly elected, impaneled, sworn and charged to inquire for the Northeastern Division of the Northern District of Alabama, upon their oaths present:

That heretofore, to-wit, on or about the 12th day of January, 1938, at or near Decatur, in the County of Morgan, State of Alabama, and within the jurisdiction of this Court, Embry Dancy, alias Henry Dancy, Nulan Wagner, and Frank Roberts, whose names are otherwise unknown to the Grand Jurors, did then and there feloniously steal, that is to say, did unlawfully take and carry away from a freight house, to-wit, the Southern Railway Freight House, certain goods, namely, one case of Avalon cigarettes and two cases of North State tobacco, a further description of which is to the Grand Jurors unknown, which said cigarettes and tobacco were moving as, and which were a part of, and which constituted an interstate shipment of freight, which were being shipped by the Brown-Williams Tobacco Company from Winston-Salem, in the State of North Carolina, to the Camp Exchange, C. C. C. Camp Co. 2449, at Moulton, in the State of Alabama, with the intent to convert the same [fol. 3] to their own use; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That at the time and place aforesaid, and within the jurisdiction aforesaid, the said Embry Dancy, alias Henry

Dancy, Nulan Wagner, and Frank Roberts, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully receive and have in their possession certain goods, namely, one case of Avalon cigarettes and two cases of North State tobacco, a further description of which is to the Grand Jurors unknown, which had been stolen from a freight house, to-wit, the Southern Railway Freight House, which said cigarettes and tobacco were being shipped by the Brown-Williams Tobacco Company from Winston-Salem, in the State of North Carolina, to the Camp Exchange, C. C. C. Camp Co. 2449, at Moulton, in the State of Alabama, knowing the same to have been stolen; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Jim C. Smith, United States Attorney.

A true bill.

C. C. McGraw, Foreman of the Grand Jury.

Filed in open Court this 16 day of February, A. D. 1938.

[fol. 4] IN UNITED STATES DISTRICT COURT

8505

UNITED STATES OF AMERICA

VS.

FRANK ROBERTS

ARRAIGNMENT AND PLEA—April 25, 1938

This cause coming on to be heard this day, comes the United States of America, by District Attorney, comes [fol. 5] also the defendant, Frank Roberts, in his own proper person, and by counsel, and being arraigned in open Court upon the indictment filed herein against him, charging an alleged violation of Section 409, Title 18, U. S. C.—Theft from Interstate Shipment of Freight—taking and carrying from a freight house, certain goods, which were moving as, and which were a part of, and which constituted an interstate shipment of freight, with the intent to convert the same to their own use; possessing certain goods, which

had been stolen from a freight house, knowing the same to have been stolen—pleads guilty thereto as charged.

Thereupon, for good cause shown, it is ordered by the Court that sentence of the Defendant, Frank Roberts be and is hereby continued until April 26th, 1938, at 2:00 o'clock, P. M.

IN DISTRICT COURT OF THE UNITED STATES, NORTHERN
DISTRICT, ALABAMA, NORTHEASTERN DIVISION

No. 8505 Criminal Indictment in Two Counts for Violation
of U. S. C., Title 18, Secs. 409

UNITED STATES

v.

FRANK ROBERTS

JUDGMENT AND COMMITMENT—April 26, 1938

On this 26th day of April, 1938, came the United States Attorney, and the defendant Frank Roberts appearing, in proper person, and by counsel and,

[fol. 6-7] The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit, take and carry away from a freight house certain goods which were a part of, and which constituted an interstate shipment of freight, with intent to convert same to his own use, and possess said goods well knowing them to have been stolen, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court.

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative for the period of Two (2) Years, and to pay a fine of Two Hundred Fifty (\$250.00) Dollars, to stand committed on May 25, 1938, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is Further Ordered that said prison sentence imposed be suspended and defendant placed on probation for a period of Five (5) Years, conditioned upon defendant paying the fine imposed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) C. B. Kennamer, Judge.

[fol. 8] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN
DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

No. 8050 Criminal Indictment in two counts for violation of
U. S. C. A., Title 18, Secs. 409

UNITED STATES OF AMERICA

v.

FRANK ROBERTS

JUDGMENT AND COMMITMENT—June 19, 1942

On this 19th day of June, 1942, came the United States Attorney, and the defendant Frank Roberts appearing in proper person upon the complaint of the Probation Officer charging violation of the terms of his probation, and

The defendant having been convicted on his plea of guilty heretofore entered on April 25, 1938 of the offense charged in the indictment in the above-entitled cause, to-wit: did unlawfully take and carry away certain goods which constituted an interstate shipment of freight with intent to convert said goods to his own use, Count 1; unlawfully receive and possess certain goods that had been stolen from an interstate shipment of freight, well knowing that said goods were stolen, Count 2; and the defendant was by the Court, heretofore on April 26, 1938 committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative for the period of Two (2) Years and fined Two Hundred Fifty (\$250.00) Dollars to stand committed, which said prison sentence was suspended and defendant placed on probation

for the period of Five (5) Years, and said fine of Two Hundred Fifty (\$250.00) Dollars was paid and the defendant having been now asked whether he has anything to say why [fol. 9] judgment should not be pronounced against him revoking his said probation and putting his suspended sentence into effect, and no sufficient cause to the contrary being shown or appearing to the Court, and it appearing to the Court that the defendant has violated the terms of his said probation, It is by the Court

• Ordered and Adjudged that the probation of the said defendant be and it hereby is revoked and sentence heretofore suspended is hereby set aside and,

It Is by the Court Further Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General of the United States or his authorized representative for the period of Three (3) Years, or until said defendant is otherwise discharged as provided by law.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) T. A. Murphree, United States District Judge.

[fol. 10] IN UNITED STATES DISTRICT COURT FOR THE NORTH-EASTERN DIVISION OF NORTH ALABAMA

[Title omitted]

MOTION FOR NEW TRIAL—Filed June 22, 1942

Comes Frank Roberts, the defendant, and files the following motion, and moves the Court to set aside the verdict of the jury and the judgment of the Court in this cause, and in support of said motion files the following grounds:

1st. Because the verdict of the jury was not supported by the evidence.

2nd. Because the defendant was sentenced June 19, 1942, without a legal conviction.

3rd. Because the defendant neither plead guilty or had a jury trial for his sentence June 19, 1942.

4th. The judgment of the Court was void because the power to sentence based upon legal authority was not vested in the Court until a legal conviction of the defendant was had.

J. N. Powell, Attorney for Defendant.

[fol. 11] IN UNITED STATES DISTRICT COURT

PETITION TO WITHDRAW MOTION FOR NEW TRIAL—Filed June 24, 1942

Comes now the defendant, Frank Roberts, appearing by counsel and shows unto the Court that heretofore, to-wit, the 22nd day of June, 1942, a motion for a new trial was filed, and now

The defendant, Frank Roberts, moves the Court to allow the said defendant to withdraw his said motion for a new trial and to file a notice of appeal to the Circuit Court of the United States for the Fifth Circuit.

This 24th day of June, 1942.

J. N. Powell, Atty. for Deft.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING DEFENDANT TO WITHDRAW MOTION FOR NEW TRIAL—Filed June 24, 1942

It appearing to the Court that on, to-wit, the 22nd day of June, 1942, the defendant in this cause filed a motion for a new trial, and

The defendant has this day filed a motion to be allowed to withdraw his said motion for a new trial, and the Court [fol. 12] is of the opinion that said motion to withdraw should be granted; it is, therefore,

Ordered that said defendant, Frank Roberts be, and he hereby is, allowed to withdraw his said motion for a new trial.

This the 24th day of June, 1942.

T. A. Murphree, United States District Judge.

IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTH-
EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

[Title omitted]

NOTICE OF APPEAL—Filed June 24, 1942.

Name and address of appellant—Frank Roberts.

Name and address of appellant's attorney—J. N. Powell,
Hartselle, Alabama.

Offense—Title 18, Section 409.

Date of judgment—June 19, 1942.

Description of judgment or sentence—Probation revoked
and suspended sentence of two years set aside and imposing
three years.

Defendant now on bail.

[fol. 13-15] I, the above-named Appellant, hereby appeal
to the United States Circuit Court of Appeals for the Fifth
Circuit from the judgment above-mentioned on the grounds
set forth below.

Frank Roberts, Appellant, By J. N. Powell, Attorney
for Appellant.

Date—June 24, 1942.

Grounds of Appeals

1. The Court erred *in that* in setting aside the former
judgment of two years and imposing instead a sentence of
three years.

I hereby certify that a copy of the foregoing notice of
appeal was served on the Honorable Jim C. Smith, United
States Attorney, this the 24th day of June, 1942.

J. N. Powell, Atty. For Deft.

Bond on Appeal for \$1,500—approved and filed June 24,
1942. Omitted in printing.

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER TO RELEASE DEFENDANT PENDING APPEAL—Filed June 25, 1942

It appearing to the Court that on, to-wit the 19th day of June, 1942, an order was entered revoking the probation of the above-named defendant and setting the suspended sentence of two years aside and imposing a sentence of three years, and

It further appearing that the defendant was on, to-wit, the 19th day of June, committed to the Madison County Jail, and

It further appearing that on, to-wit, the 24th day of June, 1942, the defendant was delivered to the United States Penitentiary at Atlanta, Georgia, and

It further appearing that on, to-wit, the 24th day of June, 1942, and within the time required by law, the defendant filed notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit and this Court approved the said defendant's appeal bond, now

It is Ordered that the defendant, Frank Roberts, be released pending said appeal from the custody of the Warden of the United States Penitentiary, at Atlanta, Georgia, upon the receipt of a certified copy of this order:

[fol. 17] The Clerk of this Court is Directed to transmit a certified copy of this order together with a certified copy of the appeal bond of the said defendant to the warden, United States Penitentiary, Atlanta, Georgia.

This the 25th day of June, 1942.

T. A. Murphree, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHEASTERN DIVISION OF THE NORTHERN DISTRICT OF
ALABAMA

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS
—Filed July 24, 1942

Name and Address of Appellant: Frank Roberts, Address, Decatur, Alabama.

Name and Address of Appellant's Attorney: J. N. Powell, Hartselle, Alabama.

Offense: Violation of National Prohibition Act and Sections — and — and — of said Act.

Original Date of Judgment: Day of —, 194—, at which time the defendant was found guilty on a plea of guilty and was sentenced to two years in the penitentiary.

Brief Description of Judgment or Sentence: Judgment of the Court on the defendant's plea of guilty, found the defendant guilty and sentenced him to two years imprisonment in the Federal Penitentiary, from which he was released on probation and during the probationary period, [fol. 18] his probation was revoked on the — day of —, 194—, and he was sentenced to three years in the penitentiary and it is from this judgment sentencing the defendant to three years' confinement in the Federal Penitentiary that the defendant takes this appeal.

Name of Prison Where Now Confined, If Not on Bail: The defendant is out on bail at the present time.

The above named Appellant hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from the judgment last above mentioned on the grounds set forth below:

Frank Roberts, Appellant.

Dated: July 23, 1942.

Grounds of Appeal

The Appellant, Frank Roberts, respectfully assigns as error the judgment of the Court in sentencing him to three years in the Federal Penitentiary, the Court having previously sentenced him to two years on the same offense, and released him on probation, and upon an alleged violation of his probation; the probation was revoked and the appellant was sentenced to three years in the Penitentiary and from this sentence of three years, the appellant respectfully appeals from this judgment of the District Court to the United States Circuit Court of Appeals.

J. N. Powell, Attorney for Appellant.

I hereby certify that I have this day mailed a copy of the foregoing notice of appeal, grounds of appeal to the Hon. Jim C. Smith, United States District Attorney, postage prepaid, Birmingham, Alabama, this July 23, 1942.

J. N. Powell, Attorney for Appellant.

[fol. 19] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 20] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 19, 1942

No. 10375

FRANK ROBERTS,

versus

UNITED STATES OF AMERICA

On this day this cause was called, and, after argument by Jasper Newton Powell, Esq., for appellant, and Jack H. McGuire, Esq., Assistant United States Attorney, for appellee, was submitted to the Court.

[fol. 21] OPINION OF THE COURT AND DISSENTING OPINION OF
HOLMES, CIRCUIT JUDGE—Filed November 24, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 10375

FRANK ROBERTS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for
the Northern District of Alabama

(November 24, 1942)

Before Hutcheson, Holmes, and McCord, Circuit Judges
McCord, Circuit Judge:

In April, 1938, the appellant, Frank Roberts, pleaded guilty to charges of stealing goods from an interstate shipment, and of possessing such goods knowing the same to

have been stolen, all in violation of 18 U. S. C. A. § 409. He was fined \$200.00 and sentenced to serve a term of two years in the penitentiary. The fine was paid, and the court suspended the execution of the sentence and placed Roberts on probation for five years under the provisions of the Probation Act, 18 U. S. C. A. § 724. At a subsequent term of court in June, 1942, after a hearing the court revoked the probation, set aside the suspended sentence of two years, and imposed a sentence of three years in the penitentiary. The three years sentence was one that might originally have been imposed, the maximum sentence under each count being ten years.

Appellant contends that the trial court was without power to revoke the two years suspended sentence and then impose a longer sentence of three years. Decision turns upon the construction of the statute relating to revocation of probation, 18 U. S. C. A. § 725:

"At any time within the probation period the probation officer may arrest the probationer without warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

The statute thus clearly gives to the trial court the power to revoke the probation or the suspension of sentence and to then impose any sentence which might originally have been imposed. This court in *United States v. Antinori*, 59 F. 2d 171, construed the probation statute to provide for retention of the trial court's jurisdiction beyond the judgment term, and upheld the action of the lower court in revoking the original suspended sentence and imposing a new sentence for a shorter term. The court, however, expressly refrained from deciding whether the trial court could, upon [fol. 23] revocation of the probation and suspended sentence, impose a new sentence for a longer term. Also see, *Scalia v. United States*, 62 F. 2d 220. In a later case, *Remer v. Regan*, 104 F. 2d 704, the Circuit Court of Appeals for the

Ninth Circuit, upheld the imposition of an increased sentence upon violation and revocation of probation. The court held that revocation of a two years suspended sentence and imposition of a sentence of imprisonment for three years was authorized by the act and did not constitute double jeopardy under the Fifth Amendment to the Constitution. This decision is in harmony with the opinion of the Circuit Court of Appeals for the Second Circuit in *United States v. Moore*, 101 F. 2d 56, certiorari denied, 306 U. S. 664. We agree with the holding in *Remer v. Regan*, *supra*, that imposition of the increased sentence did not constitute double jeopardy, and that "Under the probation act an increase of sentence is expressly authorized by the statute (18 U. S. C. A. § 725) and, consequently, it is potentially a part of the original sentence."

Under the express terms of the probation act, § 725, payment of a fine, or the making of restitution or reparation to aggrieved parties, may be made the condition of probation. We do not think that the payment of the \$200.00 fine in the case at bar constituted such a partial execution of sentence as would defeat the court's power to grant probation, or to revoke the suspended sentence and impose a new sentence of imprisonment "which might originally have been imposed". The facts of this case do not measure to infraction of the constitutional limitations discussed in *Ex parte Lange*, 18 Wall. 163, 85 U. S. 163; or *United States v. Benz*, 282 U. S. 304, at page 307. *Cf. United States v. Murray*, 275 U. S. 347.

The judgment is Affirmed.

[fol. 24] HOLMES, Circuit Judge, dissenting: .

In *United States v. Antinori*, 59 F. (2) 171, this court held that in revoking a suspended sentence the district court might impose a new one for a reduced term. It upheld the validity of the statute involved, and construed it to provide for retention of jurisdiction beyond the term in cases of probation, but it took pains to note that the power of the court to increase such sentences was not before it.

The statute grants to courts of the United States power to revoke the probation or the suspension of sentence, and to impose any sentence that might originally have been imposed; but implicit in this power is the inhibition of the Fifth Amendment that no one shall be twice put in jeopardy

for the same offense. Prior to the statute, courts of the United States had control of their sentences during the term at which they were made, but this power could not be used to violate the guarantees of personal rights found in the Fifth Amendment. *Ex parte Lange*, 18 Wall. 163. The Probation Act extended this control to a subsequent term, provided it was within the probationary period; but it would be unreasonable to ascribe to the Congress an intention to grant to the courts, at a subsequent term greater control over their judgments than they possessed during the term at which they were entered.

The Probation Act provides that courts of the United States, in crimes not punishable by death or life imprisonment, shall have power to suspend the imposition or execution of sentence and to place the defendant upon probation for a period not exceeding five years. If the imposition of the sentence is suspended, probation granted, and later the probation is revoked, the court may, within the probation period, impose any sentence that might originally have been imposed. The same is true where sentence has been imposed and probation granted, except that the defendant's punishment may not be increased, for to do so [fol: 25] is to put him in jeopardy twice for the same offense. The Probation Act must be construed in harmony with the Fifth Amendment if such construction may reasonably be made from the language employed.

In this case, when the court sentenced the defendant to pay a fine of \$200 and to serve two years imprisonment, and the fine was paid, the court lost the power to amend the prison sentence by increasing it to three years, and the Probation Act may not constitutionally be construed to authorize such amendment.

In *United States v. Benz*, 282 U. S., at page 307, the court said:

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subject for the

same offense to be twice put in jeopardy of life or limb'. This is the basis of the decision in *Ex parte Lange, supra*."

I think it was error for the court below to increase the appellant's sentence from two years to three.

[fol. 26]

JUDGMENT

Extract from the Minutes of November 24, 1942

No. 10375

FRANK ROBERTS,

VERSUS

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Homes, Circuit Judge, dissents."

[fol. 29] ORDER DENYING REHEARING

Extract from the Minutes of January 16, 1943

No. 10375

FRANK ROBERTS,

VERSUS

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 30] MOTION AND ORDER STAYING MANDATE—Filed
January 28, 1943

CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE
FIFTH CIRCUIT, NEW ORLEANS, LA.

To the Honorable Judges of the Circuit Court of Appeals
for the Fifth Circuit of the United States of America:

No. 10375

In the Matter of FRANK ROBERTS

VS.

UNITED STATES

Comes Frank Roberts, appellant, in the above styled cause and moves the Court to stay the mandate in this cause of action upon the following grounds:

1st. To file a petition in the United States Supreme Court for a writ of certiorari to this Court to send up the proceedings in this cause to the said Supreme Court so the said Court may review said cause and actions of the district Court and this Court.

2nd. That the Supreme Court may review the action of the District Court upon the question of authority of revoking a parole and opposing a longer sentence of three years.

3rd. That the United States Supreme Court may decide whether or not this appellant has been placed in jeopardy twice for the same offence.

Jasper N. Powell, Attorney for Appellant.

Copy of foregoing motions mailed this day to Hon. Jim Smith, properly addressed with proper postage attached thereto.

Jasper N. Powell, Attorney for Appellant.

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH DISTRICT

No. 10375

FRANK ROBERTS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

On Consideration of the Application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from January 16, 1943; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from January 16, 1943 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from January 16, 1943, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done At New Orleans, La., this 28th day of January, 1943.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1943

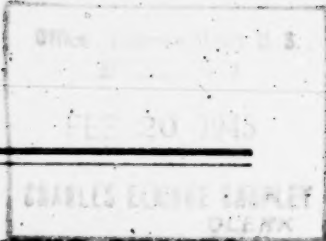
The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Benton Littleton Britnell. File No. 47,257. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 19. Frank Roberts, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 20, 1943. Term No. 19, O. T. 1943.

(7009)

FILE COPY



SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1943.

No. **136** 19

FRANK ROBERTS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals,
Fifth Circuit,
and
BRIEF IN SUPPORT THEREOF.

BENTON LITTLETON BRITNELL,
Decatur, Alabama,
Solicitor for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1943.

No.

FRANK ROBERTS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals,
Fifth Circuit.**

To the Honorable, the Justices of the Supreme Court of
the United States of America:

The petition of Frank Roberts; with respect, shows:

Your petitioner was indicted in the District Court of the United States for the Northeastern Division of the Northern District of Alabama, at the October Term, A. D. 1937; said indictment was in two counts; count one of the same charged that your petitioner did feloniously steal and unlawfully carry away from a freight house one case of Avalon cigarettes and two cases of North State tobacco; that the same constituted an interstate shipment of freight when so stolen and carried away.

Count two of said indictment charges that your petitioner did have in his possession one case of Avalon cigarettes and two cases of North State tobacco, which had been stolen from a freight depot from the Southern Railway Company, of which your petitioner knew prior to the time that he acquired the same (R. 2-3).

On the 5th day of April, 1938, your petitioner was arraigned in the court aforesaid on said indictment, and then and there entered a plea of guilty to said indictment, and said Court, for good cause shown, continued the sentence of your petitioner thereon until the 26th day of April, 1938 (R. 4-5). On April 26, 1938, in the court rooms of the United States for said court in Huntsville, Alabama, in open court, said Court sentenced your petitioner to two years imprisonment in an institution of the penitentiary type, to be designated by the Attorney General or his authorized representative, and a fine of \$250.00, your petitioner to stand committed on the 25th day of May, 1938; said Court then and there suspended the foregoing prison sentence and placed your petitioner on probation for a period of five years, conditioned upon your petitioner paying the fine imposed.

Your petitioner paid the fine as imposed and was released on probation in pursuance to the foregoing order and judgment of said Court (R. 5-6).

Your petitioner was immediately placed on probation for a period of five years, and execution of the prison term to which he was sentenced was suspended.

On the 19th day of June, 1942, your petitioner was again brought before the Court aforesaid upon complaint of his probation officer charging your petitioner with violating terms of his probation, and said Court did then and there revoke and set aside the aforesaid probation of your petitioner and immediately committed your petitioner to the custody of the Attorney General of the United States or

his authorized representative for a period of three years (R. 8-9). Your petitioner, on the 24th day of June, 1942, gave notice of appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, and did appeal said cause to said United States Circuit Court of Appeals for the Fifth Circuit (R. 12-13). Said appeal was accompanied by an assignment of errors and grounds of appeal (R. 17-18). Upon the execution of the bond (R. 13-16) the petitioner was released from the custody of the United States warden and penitentiary of Atlanta, Georgia, pending said appeal (R. 16-17).

Said cause was submitted and argued on said appeal on October 19, 1942 (R. 20), and judgment-affirming said conviction was rendered November 24, 1942 (R. 20-24).

Motion for rehearing was filed December 15, 1942 (R. 25-26). On January 16, 1943, the Court entered an order denying said motion (R. 27). Whereupon your petitioner on January 28, 1943, applied for a stay of mandate of said cause pending an application to this Honorable Court for a writ of certiorari in said cause (R. 27-28), and the same was granted upon the 29th day of January, A. D. 1943 (R. 28).

STATEMENT.

This petition is founded on the statute of the United States, Title 18, Section 725, which reads as follows:

"When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a

warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." (Mar. 4, 1925, c. 521, Section 2, 43 Stat. 1260.)

And on the Fifth Amendment to the Constitution of the United States, which reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor shall private property be taken for public use, without just compensation."

It is not disputed that the petitioner was originally fined \$250.00 and sentenced to imprisonment for a term of two years; that the fine of \$250.00 was paid immediately upon the imposition of the said sentence, and that the execution of the remainder of the sentence was suspended, and the petitioner was placed on probation by the Court for a period of five years; that during said five-year probation period, the Court revoked said probation, and resentenced the petitioner to three years imprisonment instead of two years, which meant that one year more was added to said sentence than the original sentence.

JURISDICTION.

It is contended that this Court has jurisdiction to review the judgment under Section 347 (a) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Under Title 18, Section 725 of the United States Code, can a District Judge revoke the probation of one sentenced for a criminal offense, and impose upon him a longer sentence than that originally imposed, if a fine was imposed upon the prisoner at the time of the original sentence, and the fine has been paid, and the term has ended?

2. Does Title 18, Section 725 of the United States Code violate the provision of the Fifth Amendment against putting one in jeopardy twice for the same offense, when a part of a sentence against one has been executed by the payment of the fine where a fine and a prison sentence were imposed concurrently for the same offense, and the term has ended?

3. When one is fined and sentenced to imprisonment for an offense, and the fine is paid and the execution of the prison sentence is suspended and the prisoner placed upon probation, and the probation is later worked, after the term has ended, can a longer sentence be imposed upon him than the original sentence without violating the provision of the Fifth Amendment to the Constitution against double jeopardy?

REASONS RELIED ON FOR GRANTING WRIT.

1. There is here involved an important and fundamental question of federal law which has never been directly passed on by the Supreme Court of the United States and should be settled by it.

2. The decision herein is in conflict with applicable decisions of the Supreme Court which bear upon matters herein involved, and especially *Simmons v. United States*, 58 S. Ct. 19, 302 U. S. 700, 82 L. Ed. 540; *Zerbst v. Sullivan*, 82 L. Ed. 1094, in that a part of the sentence in the case at bar was executed, and the Court set aside the sentence and rendered a new one, which was a larger one, and this was done after the term had expired.

3. The decision herein is in conflict with *United States v. Lange*, 85 U. S. 163, 21 L. Ed. 872, holding that when a fine and imprisonment are imposed as punishment for an offense, and the fine is paid, the Court cannot impose additional imprisonment.

Petitioner herewith presents, as part of this petition, transcript of record in the Circuit Court of Appeals for the Fifth Circuit. Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 10,375, *Frank Roberts, Appellant, v. United States of America, Appellee*, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Court, and that your petitioner be discharged without day and have such other and further relief in the premises as this Honorable Court may deem just and proper.

BENTON LITTLETON BRITNELL,

Solicitor for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered November 24th, 1942 (R. 24).

Petition for rehearing was denied January 16th, 1943 (R. 27).

The jurisdiction of this Court is invoked under Title 28, Section 347, of the United States Code.

The facts have been fully set forth in the petition for writ of certiorari, pages 1 to 6, supra.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is found on pages 20-22 of the transcript of the record. There is a dissenting opinion in the case, which is found on pages 22-24 of the transcript of the record. The opinion and the dissenting opinion appear in the advanced sheet of Federal Reporter (2nd Series) of January 11, 1943, the same being 131 Federal (2d) 392; however, this advance sheet does not show that any rehearing was applied for and denied.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, the same being 28 U. S. C. A. 347 (a).

SPECIFICATION OF ERRORS ASSIGNED.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that under Title 18, Section 725 of the United States Code a District Judge could revoke the probation of one who had been fined and who had a sentence placed upon him for a criminal offense, and who had been placed on probation after the fine had been paid, and that a longer prison term could be imposed upon the prisoner than was originally imposed, all of this being after the term of the Court at which the original sentence was imposed.

2. The Circuit Court of Appeals of the Fifth Circuit erred in holding that Title 18, Section 725 of the United States Code does not violate the provision of the Fifth Amendment against double jeopardy, in so far as it applies to increasing a prison sentence after term time when a part of the original sentence has been executed.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that where a fine and a prison sentence are concurrently imposed as punishment for a crime the payment of the fine is not a partial execution of the sentence.

4. The Circuit Court of the Fifth Circuit erred in holding that Title 18, Section 725 of the United States Code applies so as to give authority to a District Judge to impose a longer prison sentence upon one than was originally imposed after the term at which the original sentence was imposed when a fine was concurrently imposed as a part of the original sentence, and the fine has been paid.

ARGUMENT.

We are all familiar with the provision of the U. S. Constitution, which prohibits the punishment of one twice for the same offense. This is a provision placed in the Constitution which was a product of our common law. The United States Supreme Court has said that if there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.

Ex parte Lange, 85 U. S. 163, 21 Law. Ed. 872.

This case also states, "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." Thus we see that this almost universal maxim protects a prisoner from the action of a court in imposing more than one sentence upon him just as much as it protects him from being tried by a jury twice for the same offense.

After reviewing, analyzing and digesting the decisions of the state and federal courts discussing the subject of the power to amend, alter, change, modify or enlarge a sentence, the able, trained and discriminating annotator and reviewer, in 44 A. L. R. 1203, stated his considered judgment as follows:

"It seems to be well established that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void and the original judgment remains in force."

In Volume 24, C. J. S., page 118, the law is thus stated:

"Where accused has entered on the execution of a valid sentence, the court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence."

In Alabama, where the case originated, the law is:

"The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend nunc pro tunc for the purpose of making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment cannot be pronounced by piecemeal at different terms; and after the expiration of the term the court is without power to substitute another kind of punishment for that first imposed. **People v. Felker**, 61 Mich. 110. The judgment or sentence pronounced during the term must embrace the entire punishment imposed."

Ex parte State, In re Newton, 94 Ala. 431, 433.

To the above we add the following language of the Supreme Court of the United States:

"Archbold, in his treatise, thus announces the law: 'The court may, at any time during the same sessions or assizes or any adjournment thereof, vacate the judgment passed upon the defendant before it has become matter of record, and pass another less or even more severe. But when once the judgment is solemnly entered on the record no court can make any alteration in it.'"

"The power of the court having been exhausted in the first sentence pronounced, the second sentence was wholly without jurisdiction and was in conflict with the Constitution:

Const. U. S., Art. V;

Shepherd v. People, 25 N. Y. 406;

Kuckler v. People, 5 Park. Cr. 212."

"If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

"For of What Avail Is the Constitutional Protection Against More Than One Trial if There Can Be Any Number of Sentences Pronounced on the Same Verdict?"

Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. **It Is the Punishment That Would Legally Follow the Second Conviction Which Is the Real Danger Guarded Against by the Constitution.** But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

• **Ex parte Lange**, 85 U. S. 163, 21 L. Ed. 872, 878.

In a comparatively recent case the Supreme Court of the United States quoted at length and with approval the opinion in the **Ex Parte Lange** case and also said:

“Wharton, in Criminal Pleading and Practice, 9th ed., Section 913, says: ‘As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased.’ ”

We are well aware of the provision of the Code cited by the Government (Sec. 725, Title 18, U. S. C. A.), which provides that the trial judge may, during the probation period, resentence a prisoner for any period for which he might have been sentenced originally; but this section cannot be interpreted to mean that a court has this authority after a part of the sentence in the case has been executed, and the prisoner has suffered this punishment, as the payment of the fine in this case. To argue that this may be legally done after a part of the sentence has been executed as in this case will make the above cited section violate the provision of the Constitution just referred to, because the fine of the \$250.00 was paid in this case under the sentence of April 26, 1938, and under the argument of the Government in their brief in this case, the trial court has authority to resentence the prisoner on June 19, 1942, to “any sentence which might originally have been imposed.” The Court could, therefore, impose the maximum penalty of five years plus the maximum fine provided by the statute in that case, which would mean that the prisoner would be subjected to suffering the maximum sentence in the case plus the \$250.00 fine, which the judgment of the Court shows has been paid. Of course, this would violate the constitutional prohibition against inflicting punishment upon a prisoner twice for the same offense, and would not be permitted. Therefore, the only conclusion to be reached is that the section of the Code giving authority to the Court to resentence a prisoner who has been placed on probation to more

punishment than originally inflicted applies only where a part of the sentence has not been executed. It is argued that since the maximum sentence was not imposed in this case, the Court had authority to continue raising the sentence until it reached the maximum sentence allowed in such case. This argument is sound if a part of the sentence has not been executed, for Congress has authority to make such statute so long as it does not violate the Constitution; but if, as in this case, a part of the sentence has been executed by the payment of a fine or otherwise, the argument of the Government must necessarily change from the contention that the Court may impose any sentence that might have been originally imposed to the contention that it may impose any sentence which, added to the part of the sentence which has been executed, will total the maximum sentence provided for in the case in question. When this argument is made, they have no authority for it, because the Probation Statute cited by the Government says that any sentence may be imposed which might originally have been imposed. This gives authority to impose the maximum penalty on the second sentence, even though a part of the former sentence has been executed, or it gives no authority at all; and we are led back to the same conclusion reached above, to wit, that the Congress did not intend to pass an act which would permit punishment of a man twice for the same offense, and, therefore, the statute applies only where a part of the original sentence has not been executed.

“The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subject for

the same offense to be twice put in jeopardy of life or limb.' "

United States v. Benz, 282 U. S. 304, 75 L. ed. 354, 356.

This rule not only obtains in the decisions of the Supreme Court of the United States and of the Supreme Court of Alabama, and the textbooks, but is the rule adopted by other courts. From the case of **Re Jones**, 53 N. W. 468, 469, we quote:

"While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it was rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment in a civil case is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense. The fundamental law of the state, as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. In *re* Mason, 8 Mich. 70; *Brown v. Rice*, 57 Me. 55; *State v. Cannon* (Or.), 2 Pac. Rep. 191; *People v. Whitson*, 74 Ill. 20; *Com. v. Weymouth*, 2 Allen 147; *People v. Lipscomb*, 60 N. Y. 559; *People v. Jacobs*, 66 N. Y. 8; *Ex Parte Lange*, 18 Wall. 163; *People v. Meservey*, 76 Mich. 223, 42 N. W. Rep. 1133; *People v. Kelley* (Mich.), 44 N. W. Rep. 615."

In **People v. Sullivan**, 106 N. Y. Supp. 143, the defendant, having been sentenced to the penitentiary for a term of two months, on a motion to vacate and set aside the judgment and to impose a sentence of a different character and for a longer term, the Court held:

"A preliminary objection to the consideration of this motion on the merits is taken in behalf of the defendant, based on the contention that this court, after the pronouncement of sentence of imprisonment, is without power to revoke the sentence for the purpose of imposing a heavier one, where the sentence is itself lawful and has been in part executed by the commencement thereunder of the imprisonment of the defendant. . . . The objection to the exercise of such power by the court is that, could it be exercised, a defendant, in violation of his constitutional rights, might be punished twice for the same offense, first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment under the second. 'It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. **If So, in Either Event He Had Suffered Some Punishment Under Said Judgment, and It Was Then Beyond the Power of the Court Either to Set It Aside, Vacate, Annul, or Change It in Any Substantial Respect,** unless at the instance or on motion of the defendant.' . . . I am inclined to the view that this preliminary objection is well taken and sustained by authority. This view constrains me to deny the present motion."

EXECUTION OF SENTENCE ENTERED UPON.

It does not seem to be questioned that a fine is a punishment, as the authorities are universal in holding that a fine is a punishment:

Words and Phrases, Vol. 17, p. 36:

"A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor."

United States v. Mitchell, 163 Fed. 1014.

The Government devotes much time in their brief to the holding of the Supreme Court that a trial court may change a sentence from a larger one to a smaller one after the term of court at which it was originally entered, and they cite **United States v. Antinori**, 59 F. (2) 171, to this effect: This holding is sound, indeed, for in such case the Court is not punishing a man twice for the same offense; on the contrary, the opposite takes place. We do not have a constitutional question in such case; therefore, there is no analogy between such case and the one at bar. Too, it is noted in reading the **Antinori** case that the Court refuses to go on record as inferring that such sentence might be increased, though it could be decreased.

Where the accused has entered on the execution of a valid sentence the Court cannot, even in term time at which it was rendered, set it aside and render a new sentence.

Simmons v. United States, 89 F. (2) 591, certiorari denied 58 S. Ct. 19, 302 U. S. 700, 82 L. Ed. 540;

Cisson v. United States, 37 F. (2) 330;

Hynes v. United States, 35 F. (2) 734, citing *Corpus Juris*;

Miller v. Snook, 15 F. (2) 68;

Zerbst v. Sullivan, 82 L. Ed. 1094;

24 *Corpus Juris Secundum*, p. 118, Note 57.

The Supreme Court says that the basis for allowing a court to reduce the punishment first inflicted, and denying it the power to increase it, is the fact that in the latter case the accused would be subject to **double punishment**.

United States v. Benz, 51 S. Ct. 113, 282 U. S. 304, 75 L. Ed. 354.

Where a jail sentence and a fine were both imposed upon a prisoner for the violation of the law, the payment of the fine was held a partial execution of the sentence.

Silver v. State, 295 Pac. 311, 37 Ariz. 418.

In the case of **Ex parte Lange**, supra, where the Court imposed the maximum sentence of fine and imprisonment, and the fine was paid, and five days of the imprisonment was served, and he was again sentenced to one year imprisonment (no further fine) from the date of the first sentence five days later, the Supreme Court said:

“The petitioner, then having paid into court the fine imposed upon him of \$200.00, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment upon the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.”

In other words, the Supreme Court holds that such procedure violates the provision of the Constitution against double punishment for the same offense. The above facts would have been per case at bar exactly if the Court had chosen to exercise the power which the Government argues he had on the second sentence in this case, to wit, to “impose any judgment which originally might have been imposed in the case.” The fact that the prisoner in this case was not given the maximum sentence on the second sentence does not change the principle which governs this case.

EXECUTION OF SENTENCE ENTERED UPON.

The sentence imposed was:

“Defendant . . . is hereby committed to . . . imprisonment . . . for the period of Two (2) years, and to pay a fine of Two Hundred Fifty (\$250.00) Dollars, to stand committed on May 25, 1938.”

The fine was paid and on May 26, 1938 (the day following commitment), the "prison sentence" was suspended. The payment of the fine of two hundred and fifty dollars was an integral part of the punishment imposed. A part of the imposed punishment was executed. This cannot be annulled and restored by the Court. Having executed a part of the complete penalty, the Court was without power to increase the penalty four years afterwards.

The defendant was "committed" on May 25, 1938, and on the following day the prison part of the sentence was suspended. He paid the fine and suffered some punishment under the judgment. In a similar situation the New York Court said:

"It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If so, in either event, he had suffered some punishment under said judgment, and it was then beyond the power of the court either to set it aside, vacate, annul, or change it in any substantial respect, unless at the instance or on motion of the defendant."

People v. Sullivan, 106 N. Y. Supp. 143.

After the fine was paid and defendant stood committed for one day, the Court was without power to open up that judgment and impose another and increased punishment.

"To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

U. S. v. Benz, 282 U. S. 304, 75 L. Ed. 354, 357.

As was said by the Court in **In re Jones**, 53 N. W. 468, 469:

"It has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by

commitment of the defendant under it and substitute for it another sentence."

The fact that defendant only executed a small part of the imposed sentence by paying the fine and standing committed for only one day is immaterial. This is irrefutably shown by the following quotation:

"The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it."

"It is true that there was but one day of execution of the sentence in the Murray Case, but the power passed immediately after imprisonment began, and there had been one day of it served."

United States v. Murray, 275 U. S. 347, 72 L. Ed. 309, 313.

CONCLUSION.

Therefore, the inevitable conclusion is that the provision of the Probation Statute, which gives authority to a trial judge to resentence a prisoner during the term of probation, giving any sentence which might have originally been given, does not apply to cases where a part of the sentence has been executed, as in this case, for to hold such would declare that part of the Probation Statute referred to unconstitutional, as violating the provision of the Constitution prohibiting the punishment of a person twice for the same offense.

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either

the Constitution of the United States or the well-settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

Ex Parte Lange, 85 U. S. 163, 21 L. Ed. 782, 789.

Respectfully submitted,

BENTON LITTLETON BRITNELL,
Attorney at Law,
Decatur, Alabama,
Solicitor of Record for Petitioner.

I, Benton Littleton Britnell, Solicitor of Record for the petitioner, certify that the foregoing petition for certiorari is filed in good faith and believing the same to be meritorious.

Benton Littleton Britnell,
Solicitor for Petitioner.

FILED

SEP 20 1943

CHARLES ELLIOTT DROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. **19**

FRANK ROBERTS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Certiorari to the United States Circuit Court of Appeals,
Fifth Circuit.

BRIEF AND ARGUMENT OF PETITIONER ON THE MERITS.

BENTON LITTLETON BRITNELL,
Attorney at Law,
Decatur, Alabama,
Solicitor of Record for Petitioner.

NEWTON B. POWELL,
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Decatur, Alabama,
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No.

FRANK ROBERTS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

**Certiorari to the United States Circuit Court of Appeals,
Fifth Circuit.**

BRIEF AND ARGUMENT OF PETITIONER ON THE MERITS.

OPINIONS BELOW.

The report of the opinion of the Circuit Court of Appeals on this case is as follows:

**Roberts v. United States, 131 Federal (2d) 392,
Dissenting Opinion, page 393.**

QUESTIONS PRESENTED.

1. Under Title 18, Section 725, of the United States Code, can a District Judge revoke the probation of one sentenced for a criminal offense, and impose upon him a longer sentence than that originally imposed, if a fine was im-

posed upon the prisoner at the time of the original sentence; and the fine has been paid, and the term has ended?

2. Does Title 18, Section 725, of the United States Code violate the provision of the Fifth Amendment against putting one in jeopardy twice for the same offense, when a part of a sentence against one has been executed by the payment of the fine where a fine and a prison sentence were imposed concurrently for the same offense, and the term has ended?

3. When one is fined and sentenced to imprisonment for an offense, and the fine is paid and the execution of the prison sentence is suspended and the prisoner placed upon probation, and the probation is later revoked, after the term has ended, can a longer sentence be imposed upon him than the original sentence without violating the provision of the Fifth Amendment to the Constitution against double jeopardy?

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that under Title 18, Section 725, of the United States Code a District Judge could revoke the probation of one who had been fined and who had a sentence placed upon him for a criminal offense, and who had been placed on probation after the fine had been paid, and that a longer prison term could be imposed upon the prisoner than was originally imposed, all of this being after the term of the court at which the original sentence was imposed.

2. The Circuit Court of Appeals of the Fifth Circuit erred in holding that Title 18, Section 725, of the United States Code does not violate the provision of the Fifth Amendment against double jeopardy, in so far as it applies to increasing a prison sentence after term time when a part of the original sentence has been executed.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that where a fine and a prison sentence are concurrently imposed as punishment for a crime the payment of the fine is not a partial execution of the sentence.

4. The Circuit Court of the Fifth Circuit erred in holding that Title 18, Section 725, of the United States Code applies so as to give authority to a District Judge to impose a longer prison sentence upon one than was originally imposed after the term at which the original sentence was imposed when a fine was concurrently imposed as a part of the original sentence, and the fine has been paid.

SUMMARY OF ARGUMENT.

The provision of the Probation Statute, which gives authority to a trial judge to resentence a prisoner during the term of probation, giving any sentence which might have originally been given, does not apply to cases where a part of the sentence has been executed, as in this case, for to hold such would declare that part of the Probation Statute referred to unconstitutional, as violating the provision of the Constitution prohibiting the punishment of a person twice for the same offense.

ARGUMENT.

We are all familiar with the provision of the United States Constitution which prohibits the punishment of one twice for the same offense. This is a provision placed in the Constitution which was a product of our common law. This Court has said that if there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.

Ex parte Lange, 85 U. S. 163, 21 Law. Ed. 872.

This case also states, "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." Thus we see that this almost universal maxim protects a prisoner from the action of a court in imposing more than one sentence upon him just as much as it protects him from being tried by a jury twice for the same offense.

After reviewing, analyzing and digesting the decisions of the state and federal courts discussing the subject of the power to amend, alter, change, modify or enlarge a sentence, the able, trained and discriminating annotator and reviewer, in 44 A. L. R. 1203, stated his considered judgment as follows:

"It seems to be well established that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void and the original judgment remains in force."

In Volume 24, C. J. S., page 118, the law is thus stated:

“Where accused has entered on the execution of a valid sentence, the court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence.”

In Alabama, where the case originated, the law is:

“The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend *nunc pro tunc* for the purpose of making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment cannot be pronounced by piecemeal at different terms; and after the expiration of the term the court is without power to substitute another kind of punishment for that first imposed. *People v. Felker*, 61 Mich. 110. The judgment or sentence pronounced during the term must embrace the entire punishment imposed.”

Ex parte State, In re Newton, 94 Ala. 431, 433.

To the above we add the following language of the Supreme Court of the United States:

“Archbold, in his treatise, thus announces the law: ‘The court may, at any time during the same sessions or assizes or any adjournment thereof, vacate the judgment passed upon the defendant before it has become matter of record, and pass another less or even more severe. But when once the judgment is solemnly entered on the record no court can make any alteration in it.’ ”

“The power of the court having been exhausted in the first sentence pronounced, the second sentence was wholly without jurisdiction and was in conflict with the Constitution.

Const. U. S., Art. V;

Shepherd v. People, 25 N. Y. 406;

Kuckler v. People, 5 Park. Cr. 212.

“If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.”

“For of What Avail Is the Constitutional Protection Against More Than One Trial If There Can Be Any Number of Sentences Pronounced on the Same Verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. It is the Punishment That Would Legally Follow the Second Conviction Which Is the Real Danger Guarded Against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and, on a second conviction, a second punishment inflicted?”

“The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.”

Ex parte Lange, 85 U. S. 163; 21 L. Ed. 872, 878.

In a comparatively recent case this Court quoted at length and with approval the opinion in the Ex Parte Lange case and also said:

“Wharton in Criminal Pleading and Practice, 9th ed., Section 913, says: ‘As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased.’ ”

We are well aware of the provision of the Code cited by the Government (Sec. 725, Title 18, U. S. C. A.), which provides that the trial judge may, during the probation period, resentence a prisoner for any period for which he might have been sentenced originally; but this section cannot be interpreted to mean that a court has this authority after a part of the sentence in the case has been executed, and the prisoner has suffered this punishment, as the payment of the fine in this case. To argue that this may be legally done after a part of the sentence has been executed as in this case will make the above-cited section violate the provision of the Constitution just referred to, because the fine of the \$250.00 was paid in this case under the sentence of April 26, 1938, and under the argument of the Government in their brief in this case, the trial court has authority to resentence the prisoner on June 19, 1942, to “any sentence which might originally have been imposed.” The Court could, therefore, impose the maximum penalty of five years plus the maximum fine provided by the statute in this case, which would mean that the prisoner would be subjected to suffering the maximum sentence in the case plus the \$250.00 fine, the judgment of the Court, which has been paid. Of course, this would violate the constitutional prohibition against inflicting punishment upon a prisoner twice for the same offense, and would not be permitted. Therefore, the only conclusion to be reached is that the section of the Code giving authority to the Court to resentence a prisoner who has been placed on

probation to more punishment than originally inflicted applies only where a part of the sentence has not been executed. It is argued that since the maximum sentence was not imposed in this case, the Court had authority to continue raising the sentence until it reached the maximum sentence allowed in such case. This argument is sound if a part of the sentence has not been executed, for Congress has authority to make such statute so long as it does not violate the Constitution; but if, as in this case, a part of the sentence has been executed by the payment of a fine or otherwise, the argument of the Government must necessarily change from the contention that the Court may impose any sentence that might have been originally imposed to the contention that it may impose any sentence which, added to the part of the sentence which has been executed, will total the maximum sentence provided for in the case in question. When this argument is made, they have no authority for it, because the Probation Statute cited by the Government says that any sentence may be imposed which might originally have been imposed. This gives authority to impose the maximum penalty on the second sentence, even though a part of the former sentence has been executed, or it gives no authority at all; and we are led back to the same conclusion reached above, to wit, that the Congress did not intend to pass an act which would permit punishment of a man twice for the same offense, and, therefore, the statute applies only where a part of the original sentence has not been executed.

“The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall be

subject for the same offense to be twice put in jeopardy of life or limb.' "

United States v. Benz, 282 U. S. 304, 75 L. ed. 354, 356.

This rule not only obtains in the decisions of the Supreme Court of the United States and the Supreme Court of Alabama, and the textbooks, but is the rule adopted by other courts. From the case of *Re Jones*, 53 N. W. 468, we quote:

"While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it was rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment in a civil case is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense. The fundamental law of the state, as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. In *re Mason*, 8 Mich. 70; *Brown v. Rice*, 57 Me. 55; *State v. Cannon (Or.)*, 2 Pac. Rep. 191; *People v. Whitson*, 74 Ill. 20; *Com. v. Weymouth*, 2 Allen 147; *People v. Lipscomb*, 60 N. Y. 559; *People v. Jacobs*, 66 N. Y. 8; *Ex Parte Lange*, 18 Wall. 163; *People v. Meservey*, 76 Mich. 223, 42 N. W. Rep. 1133; *People v. Kelley (Mich.)*, 44 N. W. Rep. 615."

In *People v. Sullivan*, 106 N. Y. Supp. 143, the defendant, having been sentenced to the penitentiary for a term of two months, on a motion to vacate and set aside the judgment and to impose a sentence of a different character and for a longer term, the Court held:

"A preliminary objection to the consideration of this motion on the merits is taken in behalf of the defendant, based on the contention that this court, after the pronouncement of sentence of imprisonment, is without power to revoke the sentence for the purpose of imposing a heavier one, where the sentence is itself lawful and has been in part executed by the commencement thereunder of the imprisonment of the defendant. . . . The objection to the exercise of such power by the court is that, could it, be exercised, a defendant, in violation of his constitutional rights, might be punished twice for the same offense, first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment under the second. . . . 'It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If So, in Either Event He Had Suffered Some Punishment Under Said Judgment, and It Was Then Beyond the Power of the Court Either to Set It Aside, Vacate, Annul, or Change It in Any Substantial Respect, unless at the instance or on motion of the defendant.' . . . I am inclined to the view that this preliminary objection is well taken and sustained by authority. This view constrains me to deny the present motion."

EXECUTION OF SENTENCE ENTERED UPON.

It does not seem to be questioned that a fine is a punishment, as the authorities are universal in holding that a fine is a punishment.

Words and Phrases, Vol. 17, p. 36:

"A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor."

United States v. Mitchell, 163 Fed. 1014:

The Government devotes much time in their brief to the holding of the Supreme Court that a trial court may change a sentence from a larger one to a smaller one after the term of court at which it was originally entered, and they cite *United States v. Antinori*, 59 F. (2) 171, to this effect. This holding is sound, indeed, for in such case the Court is not punishing a man twice for the same offense; on the contrary, the opposite takes place. We do not have a constitutional question in such case; therefore, there is no analogy between such case and the one at bar. Too, it is noted in reading the *Antinori* case that the Court refuses to go on record as inferring that such sentence might be increased, though it could be decreased.

Where the accused has entered on the execution of a valid sentence the Court cannot, even in term time at which it was rendered, set it aside and render a new sentence.

Sinmons v. United States, 89 F. (2) 591, certiorari denied 58 S. Ct. 19, 302 U. S. 700, 82 L. Ed. 540;

Cisson v. United States, 37 F. (2) 330;

Hynes v. United States, 35 F. (2) 734, citing *Corpus Juris*;

Miller v. Snook, 15 F. (2) 68;

Zerbst v. Sullivan, 82 L. Ed. 1094;

24 *Corpus Juris Secundum*, p. 118, Note 57.

The Supreme Court says that the basis for allowing a court to reduce the punishment first inflicted, and denying it the power to increase it, is the fact that in the latter case the accused would be subject to double punishment.

United States v. Benz, 51 S. Ct. 113, 282 U. S. 304, 75 L. Ed. 354.

Where a jail sentence and a fine were both imposed upon a prisoner for the violation of the law, the payment of the fine was held a partial execution of the sentence.

Silver v. State, 295 Pac. 311, 37 Ariz. 418.

In the case of *Ex parte Lange*, supra, where the Court imposed the maximum sentence of fine and imprisonment, and the fine was paid, and five days of the imprisonment was served, and he was again sentenced to one year imprisonment (no further fine) from the date of the first sentence five days later, the Supreme Court said:

"The petitioner, then having paid into court the fine imposed upon him of \$200.00, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate the judgment entirely, and without reference to what has been done under it, impose another punishment upon the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

In other words, the Supreme Court holds that such procedure violates the provision of the Constitution against double punishment for the same offense. The above facts would have been per case at bar exactly if the Court had chosen to exercise the power which the Government argues he had on the second sentence in this case, to wit, to "impose any judgment which originally might have been imposed in the case." The fact that the prisoner in this case was not given the maximum sentence on the second sentence does not change the principle which governs this case.

EXECUTION OF SENTENCE ENTERED UPON.

The sentence imposed was:

"Defendant . . . is hereby committed to imprisonment . . . for the period of Two (2) years, and to pay a fine of Two Hundred Fifty (\$250.00) Dollars, to stand committed on May 25, 1938."

The fine was paid and on May 26, 1938. (the day following commitment), the "prison sentence" was suspended. The payment of the fine of two hundred and fifty dollars was an integral part of the punishment imposed. A part of the imposed punishment was executed. This cannot be annulled and restored by the Court. Having executed a part of the complete penalty, the Court was without power to increase the penalty four years afterwards.

The defendant was "committed" on May 25, 1938, and on the following day the prison part of the sentence was suspended. He paid the fine and suffered some punishment under the judgment. In a similar situation the New York Court said:

"It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If so, in either event, he had suffered some punishment under said judgment, and it was then beyond the power of the court either to set it aside, vacate, annul, or change it in any substantial respect, unless at the instance or on motion of the defendant."

People v. Sullivan, 106 N. Y. Supp. 143.

After the fine was paid defendant stood committed for one day, the Court was without power to open up that judgment and impose another and increased punishment.

"To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

U. S. v. Benz, 282 U. S. 304, 75 L. Ed. 354, 357.

As was said by the Court in *In re Jones*, 53 N. W. 468, 469:

"It has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by

commitment of the defendant under it and substitute for it another sentence."

The fact that defendant only executed a small part of the imposed sentence by paying the fine and standing committed for only one day is immaterial. This is irrefutably shown by the following quotation:

"The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it."

"It is true that there was but one day of execution of the sentence in the Murray Case, but the power passed immediately after imprisonment began, and there had been one day of it served."

United States v. Murray, 275 U. S. 347, 72 L. Ed. 309, 313.

CONCLUSION.

Therefore, the inevitable conclusion is that the provision of the Probation Statute, which gives authority to a trial judge to resentence a prisoner during the term of probation, giving any sentence which might have originally been given, does not apply to cases where a part of the sentence has been executed, as in this case, for to hold such would declare that part of the Probation Statute referred to unconstitutional, as violating provision of the Constitution prohibiting the punishment of a person twice for the same offense.

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States or the well-settled prin-

ciples of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged.”

Ex Parte Lange, 85 U. S. 163, 21 L. Ed. 782, 789.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 19

FRANK ROBERTS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Statement.

The petitioner files this reply brief and argument after the filing of the Government's brief and argument in this case.

The petitioner was sentenced, after a plea of guilty, to a term of two years in prison, and to the payment of a fine of \$250.00, on a charge of stealing cigarettes from an interstate shipment, and having such property in his possession, knowing that it was stolen. This sentence was made on April 26th, 1938, after the plea of guilt was entered on

April 25th, 1938 (R. page 2 & 3). The District Court suspended the execution of the prison sentence for a period of five years, but required the payment of the fine of \$250.00, and this fine was paid. During the probation period the Court revoked the probation, and added one year to the sentence originally imposed, making the sentence three years instead of two years. The petitioner appealed the case to the Fifth Circuit Court of Appeals, urging that his constitutional right under the Fifth Amendment of the Constitution, of freedom from double punishment for the same offense was infringed by the addition of the year to the sentence in view of the fact that the sentence had been partially executed.

Jurisdiction.

The jurisdiction of the Supreme Court in this matter is properly stated in the Government's brief, page 1.

Argument.

It is admitted in the Government's brief that the Federal courts had had no authority to change a sentence and impose a heavier one upon a prisoner after a part of the sentence had been executed prior to 1925 (the adoption of the Probation Statute). They admit that the cases of *Ex parte Lang*, 18 Wall. 163 and *U. S. v. Mayer*, 235 U. S. 65, and other cases cited by the Petitioner heretofore so held (Brief 11 and 12). They further admit that this was the law with reference to such cases whether the "Punishment" imposed was imprisonment or a fine, or a fine and imprisonment, and authorities are cited holding this to be the law. There must be a reason for this, and this reason, as pointed out in the cases cited was that Article V of the Constitution prohibits the double punishment of an offender for the same offense. Since both the Petitioner

and the Government agree on this proposition as being the law up until 1925, let us search for the authority which the Government says has changed this law with reference to the case at bar. The Government offers the following as the authority, which changed this proposition, allowing the increase of punishment after a part of the sentence had been executed:

"It is our position that the Probation Act did, properly, permit a severance of the ancient tie between fines and imprisonments, and that it is this severance which furnishes the key to the resolution of the problem presented by the petitioner" (Brief p. 13).

In other words, the Probation Act changed the law, and made it possible to increase a sentence on a prisoner on probation, even though a part of the sentence had been executed by the payment of a fine, which was a part of the same sentence and judgment as the prison sentence. This argument means that an act of Congress can change the Bill of Rights if we understand the argument of the Government. No argument is needed to show that it was impossible for Congress alone, to change this law if it was the Constitution which laid it down.

The Government urges by inference that the placing of a "Split sentence" that is, a fine and a prison sentence, and requiring the execution of one part of the split sentence, and suspending the other that the fact that it is a "Split sentence" frees the trial Court to handle the execution of each part of the sentence as it may see fit without regard for the Constitution (Brief 17-20). But can it be denied that the fine imposed is punishment for the offense? If it is (and the Petitioner and the Government agree that it is) we must find something in the Constitution, which would, at least by inference, authorize the imposition of "split sentences" on prisoners.

at the will of the trial courts without regard for the prohibition against double punishment, which is condemned by the Fifth Amendment. This amendment says:

“ . . . nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limbs . . . ”

All the cases hold that this prohibits double punishment, and the parties to this cause agree on this fact (Gov't. Brief, P. 2; n. 1) since it is punishment for a prisoner to be required to pay a fine, there is a partial execution of the sentence imposing this fine if and when it is paid, regardless of whether or not the imprisonment part of the sentence is suspended or executed. To hold otherwise would be illogical and would do violence to the Fifth Amendment, and would open the way for the elimination of the Bill of Rights by construction. The Government admits that the trial court could not have added any thing to this petitioner's fine when his probation was revoked (Brief, P. 20). Their reason for agreeing that the trial court could not do this is not given, but I assume that they would admit that this would violate the Fifth Amendment. If so, they admit that the payment of this fine of \$250 is such punishment as is prohibited by the Fifth Amendment from being imposed twice upon a person for the same offense, and the prisoner has entered upon his punishment when the fine is paid whether it be by "split sentence" or otherwise. We are constrained to believe after a diligent search of the history of our Constitution that the makers of the Constitution knew nothing of "split sentences", and did not intend to except them from the operation of the Fifth Amendment in prohibiting double punishment.

As we understand the Government's theory of "Split sentence", they contend that there are two sentences im-

posed upon the prisoner in a case of this kind, one being the fine and one being the imprisonment; and on second thought we know that this is not their theory, because if there were two sentences that, itself, would violate the Fifth Amendment. We must, therefore, return to the theory that the "split sentence" is but one sentence, and when we return to this theory it is just as any other sentence, and there is no constitutional authority for construing it any differently than it would be construed if there had been no fine in the case, but the prisoner had been sentenced, and had entered upon his term and had partially executed the sentence (as by paying the fine in this case) and the trial court had called him back before it and increased the sentence originally given him.

The Probation Act is a worthy act, providing a sound and sensible authority for dealing with a certain class of law violators; we agree with all the things said by the Government expounding the virtues of the Act. It is probably the greatest advancement made in dealing with criminals in many decades; we do not think the act is unconstitutional, but that part authorizing the trial court to impose any sentence that might have originally been imposed was never intended to apply to in those cases where the sentence has been partially executed as in this case. To so construe the act would make it unconstitutional. The act still remains, and the trial court has the power to revoke probation, and commit the prisoner to prison, to impose fines upon the revocation of probation if the sentence has not been partially executed before by the payment of a fine or serving time or otherwise, and to increase the punishment first imposed on the violator of his probation in case the sentence has not been partially executed as mentioned above. But the trial court would not have authority, and has never had authority, and can never have the authority until the Constitution is changed.

to sentence a prisoner, and after putting him on probation, collect a fine, and then increase his sentence after it is partially executed. Even the convict is protected by the Constitution; he has the right to know what punishment he is to receive for his violation of the laws of his government.

Much is said in the Government's brief about the intention of Congress in passing the Probation Act. We can not see that the intention of Congress, whatever it may have been, can aid the Government's contention in this case, as the matter is governed by the Constitution, and the act of Congress could not change the Constitution. It must be assumed, however, that Congress did not intend to pass any law which would conflict with the Fifth Amendment or any other part of the Constitution and this presumption is the basis of our contention in this case.

We are reminded of the fact that the Federal Probation Act is taken from N. Y. and Mass. acts. We call the attention of the Court to the several cases from these two distinguished districts quoted from below; it is evident from these cases that the highest courts of these jurisdiction are very jealous of the rights of a citizen under the Constitution.

A fine is pecuniary punishment for the commission of a crime or misdemeanor. *Hart v. Norman*, 155 N. Y. S. 238, 240; 92 Misc. 185.

A fine is pecuniary punishment for an offense, inflicted by sentence of court having authority to impose it. *Wilcox v. Knoxville Borough*, 2 Pa. Dist. R. 721, 725.

A fine is defined as a pecuniary punishment imposed by a lawful tribunal on a person convicted of a crime or misdemeanor. *Holliman v. Cole*, 34 P. 2d 597, 598, 168 Okla. 473.

A fine is a sum of money exacted as a pecuniary punishment from persons guilty of an offense, and is in its

nature at least, a penalty. *Nergman v. State*, 60 Pac. 2d. 699, 700, 187 Wash. 622; 106 A. L. R. 1007.

A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. *U. S. v. Mitchell*, 163 Fed. 1014, 1016.

Many such definitions from various jurisdictions under title of "Fine" in Words and Phrases, vol. 17, page 36.

ARTICLE V, CONSTITUTION OF U. S.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Fifth Amendment protects against double punishment as well as against double trial. *Kepner v. U. S.*, 195 U. S. 100, 24 S Ct. 797, 49 L. Ed. 114, 1 Ann Cas. 655; *U. S. v. Yam Tung Way*, 21 Philippine 67; *Com. v. Valey*, 63 Pa. Super. 489.

Although the prohibition strictly applies only to felonies, the Courts have been guided by the spirit, rather than the letter of the law, and have applied it to all indictable offenses including misdemeanors. *Ex Parte Lange*, 18 Wall. (U. S.) 163, 21 L. Ed. 872; *Berkowitz v. U. S.*, 93 Fed. 452, 35 C. C. A. 379.

"The signification of the word 'jeopardy' in its common use is exposure to death, loss, or injury, hazard, danger, peril." *State v. Connor*, 45 Tenn. (5 Cold.) 311, 317; *Ex parte Glenn*, 111 F. 257, 258.

"It is well settled that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new and different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void, and the original judgment remains in force." *Hickman v. Fenton*, 231 N. W. (Neb.) 510, 70 A. L. R. 819. There is an annotation following this case in A. L. R. supplementing the one in 44 A. L. R., and this annotation states that the above case is in accord with the rule laid down in the annotation in 44 A. L. R. 1203. This was a case where a man was sentenced after conviction to a term of from three to five years for incest; he served 43 days, and it was discovered that the minimum sentence that should be imposed for incest was 20 years; the Court called him back for another sentence, giving him 25 years. The Court on appeal of a habeas corpus petition held the sentence of 3 to 5 years erroneous, but not void, and it was contended by the prisoner that to allow the second sentence would put him in jeopardy twice for the same offense in violation of the provision of the state constitution, which followed the same wording as our Federal constitution.

In the case of *Miller v. Snook* (1926, D. C.) 15 Fed. (2d) 68, where the Court attempted to change a sentence 14 days after the original sentence was pronounced by *reducing* the sentence, rather than raising it, the Court said:

"The general rule is that any time during the term the Court has power to reconsider its judgment, and to revise and correct it by mitigating and even by increasing its severity, where the original sentence has not been executed or put into operation. Where the defendant, however, has executed or entered upon the execution of a valid sentence, the Court cannot, even during the term at which the sentence was rendered, set aside and render a new sentence, nor can it amend the judgment so as to be in effect a new sentence."

Annotation, 70 A. L. R. 817.

Cited in the annotation on this point in 44 A. L. R. 1202 as holding the same as *Ex Parte Lange* (21 L. ed. 872, 18 Wall. 163), is another Federal case, and it is the only Federal case cited; it is *Re. Johnson* (1891; C. C.) 46 Fed. 477.

Numerous cases from most of the states of the union are cited holding to this effect in this citation.

The following is the reason for the rule as laid down by the N. Y. Court:

"The objection to the exercise of such power by the Court is that, could it be exercised, a defendant, in violation of his constitutional rights, might be punished twice for the same offense; first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment under the second sentence."
People v. Sullivan, 54 Misc. 489, 106 N. Y. Supp. 143.

The case of *Brown v. Rice* (1869), 57 Me. 55, 2 Am. Rep. 11, is a *leading case* on this subject according to the annotator in 44 A. L. R. The defendant was convicted of false pretense, and sentenced to 6 months' jail sentence. Nineteen days later the judge re-sentenced him to 3 years imprisonment in the penitentiary, which was within the limits fixed by the law for the violation of the said law. It was objected by the defendant that he was subjected to imprisonment twice for the same offense in violation of the state constitution. The Court said:

"The cases certainly are as strong for the respondent as any that can be found, and recognize the right of the Court to go as far, at least, as we can find either reason or authority for going. But they stop at the point of execution, and clearly express or imply that after execution or warrant issued and executed, this power of summarily changing the record, or judgment, or sentence, is at an end. . . . If these proceedings were legal, it would seem that this prisoner must suffer punishment under two distinct sentences for the

same offense. If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment suffered under it. If now he is to be sent to the state prison for three years more, not counting his time in jail under the first sentence, he certainly must suffer two distinct imprisonments under two distinct sentences given at a considerable interval of time, for the same offense, and under one indictment. We think that the sentence in question to the state prison was illegally imposed, and is void and cannot be carried out.

"In the case of *People v. Meservey* (1889) 76 Mich. 223, 42 N. W. 1133, the defendants pleaded guilty of burglary, and were sentenced to be confined in the state prison for five years; on the next day, they were brought back before the court, and the judge entered on the docket sheet an order to the effect that the sentence was imposed under a misapprehension of the facts of the case, and, also, that the prisoners had not entered upon serving the term under the sentence, and that no part of the sentence had been executed, and the original sentence was set aside, and a greater sentence was imposed. The record showed that after the first sentence, the prisoners were remanded to the County jail in the custody of the Sheriff to be delivered to the State prison. Therefore, they spent one day in jail between the first and second sentences. The Court said:

"We also think that the original sentence had gone into effect, and that one day of imprisonment at Jackson, under the sentences, had passed at the time the order was made vacating them."

In the case of *Commonwealth v. Foster*, 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Reports 499, where a trial court attempted to sentence a prisoner under one count of an indictment on which he was found guilty, after he had

served a part of a term of imprisonment under a sentence on another count in the indictment, the Court said:

"The sentence might have been amended at the same term, and before any act had been done in execution thereof, *Comm. v. Weymouth*, 2 Allen (Mass.) 144, 79 Am. Dec. 776. But after the defendant had been imprisoned under it, and the term had been adjourned without day, the court could not amend it, or set it aside and impose a new sentence instead. * * * The result is that it was not in the power of the superior court, after rendering one judgment and sentence against the defendant, upon which he had been since imprisoned to order at a subsequent term that the case should be brought forward and another sentence imposed."

Where a court fined a prisoner \$50.00, and committed him to jail until paid; and on the same day had him brought before him again and set aside that sentence, and imposed a fine of \$200.00 and committed him to jail until paid, the court said the question was whether or not a court could increase the sentence after the original sentence went into effect, even during the same term. The court held that this could not be done.

A defendant was sentenced to two months; there was a motion to set aside the sentence and impose a larger one and of a different character. The court said:

"The objection to the exercise of such power by the court is that, could it be exercised, a defendant in violation of his constitutional rights, might be punished twice for the same offense, first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment on the second. * * * It is but fair and reasonable to presume that in the interim between the rendition and attempted annulment and vacation the defendant had, according to its terms, *either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If so, in*

either, even he had suffered some punishment under said judgment, and it was then, beyond the power of the court either to set it aside, vacate, annul, or change it in any substantial respect, unless at the instance or on motion of the defendant. * * * I am inclined to the view that this preliminary objection is well taken and sustained by authority. This view constrains me to deny the present motion." *People v. Sullivan* (1907) 54 Misc. 489, 106 N. Y. Supp. 143.

Where a defendant was sentenced to a term in the Boys' Industrial school for burglary under the impression that he was under 18 years of age, and it was later learned, after he had served some of the sentence, that he was over 18 years of age, the judge called him back, and sentenced him to the state prison for the same offense, the Court, after holding that the judgment, though erroneous in the first instance was legal, the court said:

"While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it was rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment even in a civil case is at an end *even in a civil case is at an end* after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense." *In Re Jones*, 35 Neb. 499, 53 N. W. 468, 469.

The most recent cases cited in A. L. R. Supplemental Decisions are: *People ex rel K. v. McK.*, 371 Ill., 190, 20 N. E. (2d) 498; *People v. S.*, 371 Ill. 627, 21 N. E. (2d) 763.

Some jurisdictions hold that the sentence may be set aside for the purpose of reducing the punishment; this is decided on the theory that to reduce the punishment does not subject the prisoner to double punishment. On the other hand, many jurisdictions hold that the judgment can not be set aside for the purpose of reducing the sentence, even. The highest court of Penn. in the case of *Commonwealth v. Mayloy* (1868) 57 Pa. 291, many years ago condemned this practice, even for the purpose of reducing the sentence, on the ground that the term of a convict would always be a matter of uncertainty with him, thereby eliminating to a great extent the effect of the punishment, and they say with reference to the power of a court to set aside a sentence and increase it:

"It is not difficult to imagine times in which the rule might thus become despotic and most oppressive."

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(8364)

No. 756

In the Supreme Court of the United States

OCTOBER TERM, 1942

FRANK ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The majority (R. 20-22) and dissenting (R. 22-24) opinions in the Circuit Court of Appeals are reported at 131 F. (2d) 392.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 24, 1942 (R. 24), and a petition for rehearing denied January 16, 1943 (R. 27). The petition for a writ of certiorari was filed February 20, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioner was given a general sentence of a fine of \$250 and imprisonment for two years. He was placed on probation as to the prison sentence provided he pay the fine. He paid the fine but later he violated the terms of his probation, probation was revoked, and he was sentenced to imprisonment for three years. The question presented is whether the Probation Act authorizes this sentence and, if so, whether, in violation of the Fifth Amendment, double punishment results.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. * * *

The pertinent provisions of Sections 1 and 2 of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259 et seq., as amended by the Act of June 16, 1933, 48 Stat. 256, 18 U. S. C. 724, 725) are:

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, * * * shall have power, after conviction or after a plea of guilty or nolo

contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. * * * the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. * * *

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a war-

rant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

Petitioner pleaded guilty in the District Court for the Northern District of Alabama on April 25, 1938, to a two-count indictment charging him and two others with violating the Act of February 13, 1913, as amended (18 U. S. C. 409), by stealing cigarettes and tobacco from an interstate shipment of freight and receiving and having the stolen cigarettes in their possession, knowing them to have been stolen (R. 2-5). On April 26, 1938, the court sentenced petitioner generally to serve 2 years' imprisonment and to pay a fine of \$250, the petitioner to stand committed on May 25, 1938, but the judgment provided that "said prison sentence imposed be suspended and defendant placed on probation for a period of Five (5) Years, conditioned upon defendant paying the fine imposed" (R. 5-6). The fine was evidently paid before the commitment date since the prison sentence was suspended and petitioner was placed on probation (R. 8; Pet. 2).

On June 19, 1942, petitioner was brought before the court charged with violating the terms of his probation. Finding that he had in fact violated

his probation, the court entered a judgment revoking petitioner's probation, setting aside the "sentence heretofore suspended" and sentencing petitioner to imprisonment for a period of 3 years, 1 year more than the punishment originally imposed (R. 8-9). The judgment was affirmed on appeal, one judge dissenting (R. 20-24).

ARGUMENT

It would now seem beyond doubt that, when a sentence of imprisonment alone is imposed but its execution is suspended and probation granted, the court may, upon revocation of probation, sentence to a greater term of imprisonment than that originally given without its action constituting double punishment. *United States v. Moore*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664.¹ See also *Remer v. Regan*, 104 F. (2d)

¹ In this case Moore had been sentenced to two years' imprisonment but execution of the sentence had been suspended and Moore granted probation. Mr. Justice Van Devanter, then retired but sitting as a United States District Judge, later revoked probation because of its violation and sentenced Moore to seven years' imprisonment and a fine of \$300. While the opinion of the circuit court of appeals did not specifically discuss Mr. Justice Van Devanter's power to increase the term of imprisonment, the question was a fundamental one, appearing upon the face of the record, and was argued in both the petition for writ of certiorari (pp. 7-8, 13-17) and the Government's brief in reply (pp. 10-12). In its reply brief the Government pointed out that Section 2 of the Probation Act expressly provides that "the court may revoke probation or the suspension of sentence, and may impose any sentence which might originally have been imposed".

704, 705-106 (C. C. A. 9), certiorari denied, 308 U. S. 553. Petitioner apparently does not question such power (Pet. 13). He contends, however, that when, as here, a fine is also imposed at the time the prison sentence is suspended and probation granted, the payment of the fine is a partial execution of the sentence² and

(italics supplied): that the effect of the provisions of Section 2 is to extend the term during which a district court, for the purpose of the Probation Act, has control over its judgment; and that since the petitioner in the case at bar had not satisfied or executed even in part the prior sentence while on probation, probation not being imprisonment or punishment, an increase in the sentence, upon revocation, did not constitute double punishment.

Petitioner asserts at one point in his petition that he also executed part of the prison sentence by "standing committed" for one day (Pet. 19). He seems to imply that an order formally suspending the prison sentence was entered on May 26, 1938, the day after the commitment date contained in the original judgment (see Pet. 18; R. 6), but no such order is contained in the record. At every other place in his petition petitioner asserts only that he paid his fine (Pet. 2, 4, 5, 12-17) and his argument is predicated almost in its entirety upon that fact alone. Indeed, in one place in his petition he states that "the fine of \$250.00 was paid immediately upon the imposition" of the original sentence (Pet. 4). It would seem unquestionable, therefore, that the fine was paid before any "actual" commitment and that, in consequence, the prison sentence was suspended without any service. (See R. 8.) There is nothing in the record to show, and petitioner does not assert, that he was ever delivered to a jail or penitentiary for service of his sentence—the time when, under 18 U. S. C. 709a, he would actually commence service of his prison sentence.

that this partial execution "freezes" the sentence, with the result that an increase in the prison part of the sentence, upon revocation of probation, constitutes double punishment. He points out that unless such an interpretation be given the statute the court, under the language permitting, upon revocation of probation, the imposition of "any sentence which might originally have been imposed," would have been authorized to require him to suffer the maximum punishment of fine and imprisonment allowed by the penal statute plus the \$250 fine which he had already paid (Pet. 12-13).

Petitioner's argument is based on the traditional concept that a judgment imposing both fine and imprisonment constitutes a single judgment and that no increase in the punishment prescribed by such a judgment may be made after it has been partially executed. This concept must, however, be discarded so far as the Probation Act is concerned because of the distinctive treatment accorded fines and imprisonment therein to accomplish the aims of that statute. In permitting suspension of the imposition or execution of sentence and the placing of a defendant

³ The generality of the language of the dissenting opinion would seem conditioned by the observation that "the fine was paid." (See second complete paragraph on R. 23.)

⁴ He also contends that it would not be permissible for the Government to argue that the court would have been restricted to the imposition of the maximum fine minus the \$250 already paid because of the sweep of the statutory authorization (Pet. 13).

upon probation, "The great desideratum" of the probation statute "was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals * * *."

United States v. Murray, 275 U. S. 347, 357.⁵

While the paramount aim was that "the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict"

(*United States v. Murray, supra*, at p. 357), the

statute reserves sufficient power to the court to award some punishment for the offense by way

of a fine at the same time that the court is suspending the imposition or execution of a prison

sentence. Section 1 provides specifically that

"the court may impose a fine and may *also* place the defendant upon probation *in the manner aforesaid*" [italics supplied].⁶ Thus, while the

⁵ We do not mean to say, of course, that the grant of power to place on probation is not sufficiently broad to permit probation on one indictment or count and imprisonment on another indictment or count. *Frad v. Kelly*, 302 U. S. 312; *Cosman v. United States*, 303 U. S. 617; see also *Burns v. United States*, 287 U. S. 216.

⁶ The italicized words relate, of course, to the preceding language permitting the court to place the defendant on probation after suspending the imposition or execution of sentence, and as here used can mean only that the court, while relieving the defendant from a prison sentence by granting probation, may also impose a fine.

court, for a single offense, may not require the defendant to serve any period of imprisonment when granting probation (*United States v. Murray, supra*), it may require him to pay a fine either as a prerequisite to the granting of probation or independently thereof. *Reeves v. United States*, 35 F. (2d) 323, 326 (C. C. A. 8); *Hollandsworth v. United States*, 34 F. (2d) 423, 426 (C. C. A. 4); *Archer v. Snook*, 10 F. (2d) 567, 569 (N. D. Ga.).

It is evident, therefore, that a sentence such as that imposed upon petitioner when probation was granted must be considered for the purposes of the Probation Act as, in essence, two separate and distinct sentences—one imposing a fine and the other dealing with the matter of imprisonment. In this light it must be apparent that no problem of double punishment arises because of the three-year sentence imposed upon petitioner upon revocation of probation. The payment of the fine had relation only to the “separate” and “distinct” sentence which imposed it, and the court did not attempt to increase the fine. The “separate” and

⁷ The fine thus imposed may be made payable in one sum before probation is granted or the court, under Section 1 (*supra*, p. 3), may permit its payment in one or several sums during the period of probation.

⁸ The Government is consequently not required in this case, as petitioner seems to think, to sponsor any interpretation of the Probation Act which would permit a court, upon revoca-

"distinct" two-year imprisonment sentence had not, in any sense, been "partially executed,"⁹ and there was hence no constitutional obstacle to the increasing of that sentence to three years¹⁰ under the statutory permission to "impose any sentence which might originally have been imposed." (Section 2, *supra*, p. 4.) The payment of the fine in the instant case does not, therefore, serve to differentiate the case in principle from the *Moore* and *Reimer* cases, *supra*, where no fine was involved but prison sentences which had not been executed in whole or in part were increased upon revocation of probation.

Petitioner cites no case which makes against the view that Congress may ~~not~~ validly treat a fine and imprisonment on a different basis for the purpose of probation, and no plausible reason suggests itself why this may not be done. *Ex parte Lange*, 18 Wall. 163, cited by petitioner, is clearly inapposite since there a permitted alternative penalty was fully satisfied.

tion of probation, to increase a fine which has already been paid.

⁹ Indeed, as it specifically provided, the two-year imprisonment sentence was, by direction of the District Court, "suspended"; i. e., it was not to be executed.

¹⁰ The maximum term of imprisonment to which petitioner could have been sentenced for each of the two offenses to which he plead guilty was ten years (48 U. S. C. 409).

CONCLUSION

The case presents no constitutional problem. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MARCH 1943.

No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1943

FRANK ROBERTS, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 19

FRANK ROBERTS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The majority (R. 10-12) and dissenting (R. 12-14) opinions in the circuit court of appeals are reported at 131 F. (2d) 392.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 24, 1942 (R. 14); and a petition for rehearing denied January 16, 1943 (R. 15). The petition for a writ of certiorari was filed February 20, 1943, and was granted April 5, 1943 (R. 17). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioner was given a general sentence of a fine of \$250 and imprisonment for two years. He was placed on probation as to the prison sentence provided he pay the fine. He paid the fine but later violated the terms of his probation; probation was revoked, and he was sentenced to imprisonment for three years. The question presented is whether the Probation Act authorizes this "increase" in sentence and, if so, whether, in violation of the Fifth Amendment, double punishment results.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. * * *

The pertinent provisions of Sections 1 and 2 of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259, *et seq.*, as amended by the Act of

¹ While couched in terms of jeopardy, this Court said in *Ex parte Lange*, 18 Wall. 163, 173, that it did not doubt that this language "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." See also *Albrecht v. United States*, 273 U. S. 1, 11; *United States v. Benz*, 282 U. S. 304, 307.

June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724, 725) are:

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia,² when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required

² The District of Columbia had its own probation statute (see D. C. Code, Title 24, Secs. 101-105).

to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

Petitioner pleaded guilty in the District Court for the Northern District of Alabama on April 25, 1938, to a two-count indictment charging him and two others with violating the Act of February 13,

1913, as amended (18 U. S. C. 409), by stealing cases of cigarettes and tobacco from an interstate shipment of freight and receiving and having the stolen cigarettes in their possession, knowing them to have been stolen (R. 1-3). On April 26, 1938, the court sentenced petitioner generally to serve 2 years' imprisonment and to pay a fine of \$250, petitioner to stand committed on May 25, 1938; but the judgment provided that "said prison sentence imposed be suspended and defendant placed on probation for a period of Five (5) Years, conditioned upon defendant paying the fine imposed" (R. 3-4). While the record does not show the precise date the fine was paid, it was unquestionably paid before the commitment date, since it is clear that execution of the prison sentence was suspended and petitioner placed on probation (R. 4-5).³

³ There is no factual statement in petitioner's brief on the merits, but at one place in his argument (Br. 14) and also in the petition for a writ of certiorari (Pet. 18) he states that "The fine was paid and on May 26, 1938 (the day following commitment), the 'prison sentence' was suspended," and that "The defendant was 'committed' on May 25, 1938, and on the following day the prison part of the sentence was suspended." If petitioner means that there was a formal order on May 26, 1938, the day following the "commitment" date, suspending the prison sentence and placing him on probation, there is nothing in the record which substantiates that. In any event the record contains nothing which shows, and petitioner does not assert, that he was ever actually "committed" before the suspension of execution of the prison term and probation became effective, i. e., that he was ever delivered to

On June 19, 1942, within the probation term, petitioner was brought before the court and charged with violating the terms of his probation. Finding that he had in fact violated his probation, the court entered a judgment revoking petitioner's probation, setting aside the "sentence heretofore suspended" and sentencing petitioner to imprisonment for a period of three years, one year more than the term originally imposed (R. 4-5). The judgment was affirmed on appeal, one judge dissenting (R. 10-14).

a jail or penitentiary for service of the prison sentence—the time when, under 18 U. S. C. 709a, he would start service of his prison sentence. There is no claim that the probation and suspension of prison sentence were ineffective, as they would have been, if petitioner had previously commenced to serve his prison sentence. *United States v. Murray*, 275 U. S. 347. The record makes it clear, we think, that the suspension of execution of the prison sentence and probation followed immediately upon payment of the fine, without any interval of service of the prison sentence (R. 4-5). Indeed, at one place in his petition for a writ of certiorari (p. 4) petitioner states categorically "that the fine of \$250.00 was paid *immediately* upon imposition of the [original] sentence, and that the execution of the remainder of the sentence was suspended, and the petitioner was placed on probation by the Court for a period of five years." [Italics supplied.] And at other places in his petition he states that probation and suspension of the execution of the prison term followed immediately upon the payment of the fine (Pet. 2). Moreover, his argument implicitly recognizes the validity of the probation and the suspension of the prison sentence, his contention being that payment of the fine prevented the increasing, upon revocation of probation, of the prison term (Br. 3, 4, 9, 12, 14, 15).

SUMMARY OF ARGUMENT

I

Under the Probation Act the district court was empowered to impose a fine and suspend the execution of a prison sentence. Section 1 of the Act so provides in plain terms, and the provision accords with the philosophy of the Act in avoiding the stigma of imprisonment and the contaminating influence of association with hardened criminals while at the same time permitting the exaction of a different kind of punishment, pecuniary in character. The pattern for this type of "split sentence" was found in state legislation existing when the federal act was adopted.

Section 2 of the Act authorizes the court to revoke the probation or suspension of sentence and impose any sentence which might originally have been imposed. This power does not apply, of course, to the portion of the sentence which has been executed, that is, the fine. But it does permit revocation either where sentence of imprisonment has not been imposed or where its execution has been suspended. In the latter case, upon revocation, the original sentence may be retained, or it may be diminished or increased, within the limits of any sentence of imprisonment which might have been imposed. That Congress did not intend to make a sharp differentiation between suspension of imposition and suspension of execution in this regard is indicated not only

by the language employed, but by the consequences which would arise upon such a distinction. Courts would inevitably turn to the device of suspending imposition of sentence rather than execution; and it cannot be supposed that Congress intended to impel this result in a statute whose keynote is flexibility in administration. See *Burns v. United States*, 287 U. S. 216, 220. Moreover, the present Act is in contrast to an earlier measure which was passed but pocket-vetoed, which provided that upon revocation of suspension of sentence the defendant must serve the sentence originally imposed. Congress took as its model the New York statute, which provided for the imposition of any punishment which might originally have been imposed.

It follows that, whether imposition or execution is suspended, the declaration of the court with respect to the suspended punishment is tentative until revocation occurs or the period therefor has passed.

II

Since the declaration of punishment was tentative or provisional, there is no double jeopardy in changing the declared term of punishment from two years to three years upon proceedings for revocation. The difference to the defendant between suspension of imposition and of execution is one of "trifling degree," as this Court observed in the *Korematsu* case, decided at the last Term.

It would be unrealistic to cause constitutional rights to pivot on such a distinction. Indeed, if the action of the court in the present case were unconstitutional, doubt would be cast on the power to extend the period of probation itself, a power which is also expressly granted in the Act and which is at the core of the probationary scheme; probation itself is a form of "ambulatory punishment," as this Court said in the *Korematsu* case.

The only decisions on the question under the Probation Act support our position. See, in addition to the present case, *Moore v. United States*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664, in which the trial judge was Mr. Justice Van Devanter; and *Remer v. Regan*, 104 F. (2d) 704 (C. C. A. 9), certiorari denied, 308 U. S. 553. The cases relied on by petitioner involved the partial execution of sentences which were completely final in character.

ARGUMENT

Petitioner contends that the district court had no authority to "increase" his prison sentence from two to three years upon revocation of his probation, arguing that his payment of the \$250 fine was a partial execution of his sentence and that the Fifth Amendment prohibits an increase in sentence after partial execution thereof (Br. 3, 4, 9, 12, 14, 15). The dissenting judge in the circuit court of appeals appears also to take that position as well as the broader one that the Fifth

Amendment forbids any increase in sentence upon revocation of probation, irrespective of the payment of a fine (R. 13). Hence, both arguments conclude that the Probation Act must be construed as not authorizing the "increase" in sentence which here resulted when probation was revoked (Br. 9; R. 13), although they apparently acknowledge that the Act is susceptible of that interpretation (Br. 8-9, R. 13).

These arguments rest upon concepts of finality of a criminal sentence as a measure of punishment which are without value where the sentence is accompanied by probation pursuant to the grant of authority contained in the Probation Act. Where a sentence is completely suspended in operation and the defendant placed on probation, it is our position that the Act permits a nullification of that sentence on revocation of probation, and the imposition of any sentence, within the permitted maximum, which might originally have been given. The Act also authorizes what may be termed a "split" sentence, like the one here imposed. Where fine and imprisonment is imposed, payment of the fine may be compelled at the same time that execution of the imprisonment portion of the sentence is suspended. The prison portion of the sentence, in contrast to the fine, is not final as a measure of punishment, and on revocation of probation the court may vacate it and impose any term of imprisonment which it might originally

have imposed, whether more or less than that first given. The Act, so construed, is not, we submit, subject to the infirmity that it permits double punishment.

I

THE ACT AUTHORIZED THE "INCREASE" IN THE PRISON
SENTENCE UPON REVOCATION OF PROBATION

Background of the statute.—The Federal Probation Act was passed in 1925. Prior thereto this Court had held in *Ex parte United States*, 242 U. S. 27, decided in 1916, that a Federal court was without inherent power either to refrain from the imposition of sentence, or to suspend the execution of a sentence, during the good behavior of the defendant. It was also settled, as a general principle, that a Federal court could not set aside or alter its judgments, either in criminal or civil cases, after the expiration of the term at which they were entered, unless a proceeding for that purpose was begun during the term. *United States v. Mayer*, 235 U. S. 55, 67, decided in 1914. It had further been held that a court even during the term could not increase a valid sentence, or a valid portion thereof, which had already been satisfied. *Ex parte Lange*, 18 Wall. 163. The theory appears to have been that the beginning of the service of a sentence, and hence a partial execution of it, ended the power to change it, at least to the extent of increasing it, although the change was attempted at the same term. *United States v.*

Murray, 275 U. S. 347, 358; *United States v. Benz*, 282 U. S. 304, 307-309; cf. cases cited in footnote 32, *infra*, p. 34.

It is therefore evident that prior to the enactment of the Probation Act a Federal court was rigidly bound to impose sentence in a criminal case upon conviction; it was not able to retain any control over its sentence during the good conduct of the defendant; and it could not, even at the same term, if there had been a partial execution or satisfaction, increase a valid sentence, however justifiable might be the ground therefor.

These principles were just as applicable where the sentence was a fine, or fine and imprisonment, as where it was one of imprisonment alone. Cf. *Ex parte Lange*, *supra*; *In re Bradley*, 318 U. S. 50. Fines and imprisonment were considered co-equal, legally, as media of punishment, even though their impact was not the same. (See, e. g., *United States v. Mitchell*, 163 Fed. 1014, 1016 (C. C. D. Ore.).) Nothing was to be served by differentiation between them in the situations in which the principles recited were applied.

But since a fine is primarily a pecuniary punishment, while imprisonment requires detention

* In the latter case, decided after the passage of the Probation Act, it was held that at the same term a court could shorten a term of imprisonment, although the defendant had entered upon the service of his sentence.

of the offender either in a jail or a penitentiary, there was good reason for making a differentiation for purpose of probation. It is our position that the Probation Act did, properly, permit a severance of the ancient tie between fines and imprisonment, and that it is this severance which furnishes the key to the resolution of the problem presented by petitioner.

In *Ex parte United States, supra*, at p. 52, this Court had suggested that Congress had "adequately complete" power to permit the suspension of the imposition or execution of sentence and the granting of probation. This suggestion furnished the inspiration for a movement to enact a Federal probation act (*United States v. Murray*, 275 U. S. 347, 354-355, 357; H. Rep. No. 1377, 68th Cong., 2d Sess., pp. 1, 3), but it was not until eight years later that the present legislation resulted, accomplishing, as was said in *United States v. Maisel*, 26 F. (2d) 275, 276 (S. D. Tex.), "at one stroke for the federal courts the redramatization of the criminal law" by making the punishment fit the individual.

The dominant purpose of the statute was well summarized by Chief Justice Taft in the *Murray* case, *supra*, at pp. 357-358, when he said:

What was lacking in these provisions [for executive clemency and parole] was an amelioration of the sentence by delaying actual execution or providing a sus-

pension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict. This amelioration had been largely furnished by a power which trial courts, many of them, had exercised to suspend sentences. In some sections of the country it had been practiced for three-quarters of a century. By the decision in *Ex parte United States*, 22 U. S. 27, that remedy was denied. In that case, however, this court suggested legislation to permit probation. For eight years thereafter Congress was petitioned to enact it, and finally the Probation Act was passed.

The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus poenitentiae* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. * * *

It was therefore held in that case that when a person sentenced to imprisonment has begun to serve his sentence the court is without power under the Act to grant him probation, even though

the term at which the sentence was imposed had not expired.⁵

But the avoidance of imprisonment and its accompanying consequences does not require that, in the grant of probation, the defendant should go free of a different kind of punishment or that he should escape all burdens except the necessary one of behaving himself properly. It is entirely consistent with that aim that, at the same time provision is made to free him of imprisonment, he be required to pay a fine,⁶ or to provide for his dependents or to make good the damages his offense caused. There was no occasion therefore for Congress, in the enactment of a probation law, to require that fines be treated on the same footing as imprisonment; and it is because

⁵ It has since been held that a court may grant probation on one indictment or count and may sentence to imprisonment on another indictment or count. *Frad v. Kelly*, 302 U. S. 312; *Cosman v. United States*, 303 U. S. 617; see also *Burns v. United States*, 287 U. S. 216. While the language utilized in Section 1 of the Act permitted no escape from this conclusion, since it authorizes exercise or nonexercise of the probationary power as to "any crime or offense," this, of course, does not detract from the fact that the dominant aim of the statute, in authorizing the grant of probation, is the avoidance of imprisonment.

⁶ In *Barney v. Aderhold* (N. D. Ga.), unreported, but quoted in Chappell's *Decisions Interpreting the Federal Probation Act* (1937), pp. 13-14, it was said: "It is believed that imprisonment stands on a different footing from a fine. A fine is a punishment 'tis true, but it is not a punishment inconsistent with the main purpose of probation, namely—rehabilitation."

Congress did not do so, as we shall show, that the ordinary rules as to when a sentence becomes final and unchangeable as the yardstick of punishment are inapplicable.

Exaction of a fine and suspension of execution of a prison sentence under Section 1.—Section 1 provides that for any offense not punishable by death or life imprisonment the district courts shall have power—

to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; *or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid.* * * *

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation. * * * [Italics supplied.]

The salient feature of these provisions is the flexibility which they permit in imposing sanctions. As was said by Mr. Chief Justice Hughes in *Burns v. United States*, 287 U. S. 216, 220, "To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. * * * The provisions of the Act are adapted to this end." Section 1, *supra*, em-

It is provided, however, in Section 1 that "The period of probation, together with any extension thereof, shall not exceed five years."

powers a court either (a) to suspend sentence entirely, by suspending imposition or execution, or (b) to pronounce a "split sentence,"⁹ by requiring the payment of a fine (where permitted by the substantive law) as a condition to the granting of probation, as in the present case,¹⁰ or as one of the terms of probation,¹¹ while at the same time deferring the imposition or execution of a term of imprisonment.¹² Our concern is primarily with the authority to impose a fine as part of a sentence, which in its remaining part is suspended.

⁹ *Cote v. Cummings*, 126 Me. 330, 335 (1927).

¹⁰ *Reeves v. United States*, 35 F. (2d) 323, 324, 326 (C. C. A. 8.); *Campbell v. Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.); cf. *Hollandsworth v. United States*, 34 F. (2d) 423, 426 (C. C. A. 4); *In re McCoy*, 98 Cal. App. 723, 726, 727 (1929).

¹¹ H. Rep. No. 1377, 68th Cong., 2d Sess., p. 5; *Archer v. Snook*, 10 F. (2d) 567, 569 (N. D. Ga.); *Scalia v. United States*, 62 F. (2d) 220, 221 (C. C. A. 1).

¹² This alternative would seem to exclude the converse, that a court may suspend payment of satisfaction of a fine and at the same time require that the offender serve a term of imprisonment. *Archer v. Snook*, 10 F. (2d) 567, 569 (N. D. Ga.). Such a sentence would fly in the teeth of the purpose of the probation act to avoid imprisonment. *United States v. Murray*, *supra*. As was said in *Barney v. Aderhold*, *supra*, "It may * * * be noted that the Act itself specifically provides for fine in connection with probation, but is conspicuously silent as to imprisonment and probation."

There can only be a complete suspension of whatever sentence is pronounced (cf. *Santis v. Esola*, 50 F. (2d) 516 (C. C. A. 9) or, alternatively, a partial execution and a partial suspension in the single instance where the payment of a fine is required concomitantly with suspension of the imposition or execution of a prison sentence.

This authority is in furtherance of the basic philosophy of the Act, as enunciated by this Court in the *Murray* case, of avoiding the stigma of imprisonment and the contaminating influence of association with hardened and veteran criminals (*supra*, pp. 14-15), while permitting the imposition of a different kind of punishment, a pecuniary punishment.¹² The pattern for this form of "split sentence" was evidently found principally in the New York and Massachusetts statutes.¹³

¹² There can be no doubt that since Congress can validly permit a court, in the interest of probation, completely to suspend the imposition or execution of sentence (*Ex parte United States, supra*), it can exercise the lesser power of allowing a partial suspension and a partial execution for the same reason. In *Frad v. Kelly*, 302 U. S. 312, 315-316, this Court, after reciting the provisions of Sections 1 and 2, including the provision in Section 1 authorizing the courts to impose a fine and place the defendant upon probation, stated that "The validity of the cited provisions is not open to question."

¹³ In the House Report on the bill which became the probation law it was stated that "This bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work," and that "two States, New York and Massachusetts, may be cited as having the most complete systems." (House Report No. 1377, *supra*, pp. 3, 4.)

At the time of the enactment of the Federal Probation Act elaborate provision was made in Massachusetts permitting a specialized treatment of fines. (See Mass. Ann. Laws (1932; 1942 Supp.), ch. 279, secs. 1 and 1A, which, with minor amendments, state the law as it was at the time the Federal statute was passed.)

Section 2188 of the New York Penal Code provided that the courts could "suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment

Revocation and imposition of greater prison sentence under Section 2.—The Government does not contend, as petitioner seems to assume (Br. 8-9), that where, as here, a fine has been exacted and paid as a condition to relief from the service of a term of imprisonment and the grant-

and may in either case place the defendant on probation." Corresponding provisions were contained in Sections 470-a and 483 (1) of the New York Code of Criminal Procedure. [Section 2188 of the Penal Code and Sections 470-a and 483 (1) of the Code of Criminal Procedure were amended in 1925 after the Federal act was passed by deleting the words "whole or part of," thereby withdrawing the previous authority to suspend sentences in part (See N. Y. Laws, 1925, ch. 276, passed April 1, 1925, and effective September 1, 1925; *Ex parte Kuney*, 5 N. Y. S. (2d) 644, 662 (1938)).] Identical provisions are contained in the probation laws of at least four states (See, e. g., Ala. Code (1940) Title 62, sec. 130; Maine Laws (1933), ch. 233; Mass. Ann. Laws (1932; 1942 Supp.), ch. 279, sec. 1A; Miss. Code Ann. (1930), ch. 21, sec. 1298.

In Indiana it is provided that "in case the court shall impose a fine, with a concurrent sentence of imprisonment, the court may suspend the execution of the sentence of imprisonment and may place the defendant on probation and may require that said fine be paid in one or several sums while on probation" (4 Ind. Stats. Ann. (Burns 1933), sec. 9-2209).

At least three states have provisions identical with the Federal act in so far as they give their courts power to "impose a fine" and also place the defendant upon probation and provide that payment of the fine may be a condition of probation (see N. C. Code Ann. (1939), sec. 4665 (1) and (3); 4 Colo. Stats. Ann. (1935), c. 140, secs. 1 and 2; S. C. Code (1942), sec. 1038-1 and 1038-3). One of these, the North Carolina statute (*State v. Wilson*, 216 N. C. 130, 133-134 (1939); *State v. Pelley*, 221 N. C. 487, 498 (1942)), has been interpreted as authorizing the imposition of a "split" sentence. The California and Virginia statutes, which in this

ing of probation, the court has the power upon revocation of probation to impose an additional fine. The fine portion of the judgment has been satisfied and executed. Cf. *Santis v. Esola*, 50 F. (2d) 516, 517 (C. C. A. 9). The only portion of the judgment over which the court retains control beyond the term is that part covered by the suspension and as to which the offender is on probation, the part dealing with imprisonment.

connection merely provide that fine may be a condition to probation (Cal. Penal Code (Deering 1937), sec. 1203.1; Va. Code Ann. (1936; 1940 Supp.), sec. 1922b), have been interpreted as impliedly authorizing a "split" sentence (see *Ellis v. Dept. of Motor Vehicles*, 51 Cal. App. (2d) 753 (1942); *Richardson v. Commonwealth*, 131 Va. 802 (1921)). Others of these state statutes simply provide that the payment of a fine may be a condition of probation (see e. g., 25 Mich. Stats. Ann. (1935), sec. 28.1133; Oregon Comp. Laws Ann. (1940), sec. 26-1226; Utah Code Ann. (1943), sec. 105-36-17; 10 Rev. Stats. of Wash. (Remington 1931), sec. 10249-5b; N. J. Stats. Ann. (1939), sec. 2.199-2; W. Va. Code (1941 Supp.), sec. 6291 (16)), but would seem interpretable as authorizing the imposition of "split" sentences, for all of these probation acts, however worded, reflect the general intent to suspend service of a "prison" sentence while at the same time authorizing the imposition of some punishment, by the way of a fine, for the offense committed.

California and Michigan go so far as specifically to authorize service of a jail sentence as a condition of probation. This, it would seem is a misapplication of the basic theory which underlies probation legislation.

For a composite review of the probation statutes of the several states as of 1939, see *Attorney General's Survey of Release Procedures*, Vol. I, *Digest of Federal and State Laws on Release Procedures*.

Pursuant to that control, and in order to make the statute effective, a defendant who violates the terms and conditions of his probation may, under the authority of Section 2,¹⁴ be brought before the court and given a hearing (*Escoe v. Zerbst*, 295 U. S. 490, 492). If the charge is found to have been sustained, "Thereupon the court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed." In the instant case the court ordered "that the probation of the said defendant be * * * revoked and sentence heretofore suspended * * * set aside" and imposed a new term of imprisonment for three years (R. 5), which was within the permitted maximum (18 U. S. C. 409).

The use of the word "or," rather than "and," in the clause giving the court permission "to revoke the probation or the suspension of sentence"

¹⁴ The portion of Section 2 here involved reads as follows:

"At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. *Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.*" [Italics supplied.]

does not narrow the power of revocation. Probably the alternatives were employed to take account of the situation where revocation occurs, as it may, after the period of probation but during the maximum period for which the defendant might have been sentenced.¹⁵ In that situation, revocation of "probation" would be futile; revocation of "suspension of sentence," however, would be effective, whether the suspension had related to imposition or execution, and the phrase is aptly used to include both sorts of suspension.¹⁶

¹⁵ See *Frad v. Kelly*, 302 U. S. 312, 318; *Moore v. United States*, 101 F. (2d) 56, 58 (C. C. A. 2), certiorari denied, 306 U. S. 664; *Van Riper v. United States*, 113 F. (2d) 929 (C. C. A. 2), certiorari denied, 311 U. S. 696; *Mason v. Zerbst*, 74 F. (2d) 920 (C. C. A. 10); *Hollandsworth v. United States*, 34 F. (2d) 423, 427 (C. C. A. 4); cf. *Sanford v. King*, 136 F. (2d) 106, 108-109 (C. C. A. 1).

For present purposes it is unnecessary to consider whether conduct giving occasion for revocation, or only the revocation itself, may occur after the period of probation. Cf. *Moore v. United States*, *supra*.

¹⁶ Another explanation of the language is given in *Scalia v. United States*, 62 F. (2d) 220, 223, where the Circuit Court of Appeals for the First Circuit said:

"The phrase 'suspension of sentence' in this paragraph, as ordinarily used and understood, means the suspension of the execution of a sentence already imposed; and the phrase 'revoke the probation' undoubtedly refers to the situation where, under the provisions of the act, imposition of sentence has been withheld but probation granted; * * *. In other words the phrase 'thereupon the court may revoke the probation or the suspension of sentence' means that the court may revoke the probation and suspension of sentence where

No court has ever denied nor do the petitioner and the dissenting judge question, that the power to revoke under Section 2 is coterminous with the power to suspend sentence and place on probation granted in Section 1. The revocation clause has uniformly been construed as authorizing revocation in a case of suspension of execution of sentence (see cases cited in notes 19, 20, 21, *infra*, p. 25), as well as in the case of suspension of imposition of sentence. It would be indeed an absurd result, destroying the usefulness of the statute, if probation could be revoked only where the im-

sentence has been imposed, or, where sentence has been withheld, revoke the probation: * * *

And in *Moore v. United States*, 101 F. (2d) 56, 58 (C. C. A. 2), certiorari denied, 306 U. S. 664, it was said:

"It is true that the term 'suspension of execution of sentence' was not included in the statute which provides that 'the court may revoke the probation or the suspension of sentence' but the statute covers both the situation where probation has been granted after sentence has been imposed and its execution suspended and that where it has been granted without the actual imposition of any sentence as where there has been a suspension of the sentence itself."

Still another possible explanation is that under the statute probation cannot be granted without a "suspension of sentence," either through the suspension of its imposition or its execution, and vice versa. Cf. *Miller v. Aderhold*, 288 U. S. 206; *Campbell v. Aderhold*, 36 F. (2d) 366 (N. D. Ga.). Congress therefore may have used the word "or" merely as a link between two synonyms. The term "suspension of sentence" has commonly been applied to either suspension of imposition or suspension of execution of sentence (*Richardson v. Commonwealth*, 131 Va. 802, 808 (1921)).

sition of sentence is suspended and not where the execution of a sentence is suspended.

If, then, the revocatory power extends equally to both situations, the court may, upon revocation of probation, in the plain terms of the statute, "impose any sentence which might originally have been imposed." (*Attorney General's Survey of Release Procedures*, Vol. II, *Probation*, p. 334; Chappell, *Decisions Interpreting the Federal Probation Act* (1937), pp. 21-22.) This means obviously that in a case in which a sentence has been pronounced and its execution deferred, the court may supplant that sentence with a new sentence¹⁷ which gives either the same punishment

¹⁷ This does not mean, as petitioner seems to think the Government must contend (Br. 8-9), that where payment of a fine had been required and execution of a sentence of imprisonment has been suspended, the court upon revocation of probation may impose not only the maximum term of imprisonment but also, in disregard of the payment of the fine, impose the maximum fine allowed by the penal statute or the maximum fine minus the fine paid. The revocatory power and the concomitant power to "impose any sentence which might originally have been imposed" extends only to that portion of the sentence which has been suspended, the imprisonment portion. There has been no suspension of the fine portion of the sentence. That has been executed or satisfied.

¹⁸ While it was said in 36 Op. A. G. 186, 192, that, "If it had been the intention to create such an important power [authority to change the original sentence], it would seem that more explicit language would have been used," it is difficult to see how Congress could have made its intention much plainer.

as,¹⁹ or more,²⁰ or less,²¹ than that provided in the original sentence.²²

¹⁹ *Weber v. Squier*, 124 F. (2d) 618 (C. C. A. 9), certiorari denied, 315 U. S. 810; *Kaplan v. Hecht*, 24 F. (2d) 664 (C. C. A. 2); *Cornerz v. United States*, 69 F. (2d) 965 (C. C. A. 5); *Campbell v. Aderhold*, 36 F. (2d) 366 (N. D. Ga.).

²⁰ *Moore v. United States*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664; *Remer v. Regan*, *supra*; cf. *Mason v. Zerbst*, 74 F. (2d) 920 (C. C. A. 10); *Nix v. James*, 7 F. (2d) 590, 592 (C. C. A. 9); cf. *In re Marcus*, 11 Cal. App. (2d) 359 (1936).

²¹ *Van Riper v. United States*, 113 F. (2d) 929 (C. C. A. 2), certiorari denied, 311 U. S. 696; *Reeves v. United States*, 35 F. (2d) 323 (C. C. A. 8); *Scalia v. United States*, 62 F. (2d) 220, 221, 223 (C. C. A. 1); *United States v. Antinori*, 59 F. (2d) 171 (C. C. A. 5); *Cline v. United States*, 116 F. (2d) 275 (C. C. A. 5); *Crowder v. Aderhold*, 46 F. (2d) 357 (N. D. Ga.). [This decision is somewhat unclear. It is difficult to tell whether the decision sustained the reduction within the framework of the Probation Act or not. The sentencing judge certainly purported to act under that statute and his new sentence was upheld, but the decision states (p. 358): "Since revocation of a previous sentence is not mentioned, perhaps the power to impose any sentence that might have been originally imposed ought to be confined to cases in which no sentence had been pronounced before probation, but this need not be determined, because the new sentence was less than the old one and affords the applicant no cause for complaint." This decision is the only case we have found which expresses even a doubt that the language of the Probation Act permits a new sentence on revocation. Cf. however, the later holdings of the same judge in *United States v. Antinori*, 59 F. (2d) 171 (C. C. A. 5), *United States v. Akerman*, 61 F. (2d) 570 (C. C. A. 5), and *Cornerz v. United States*, 69 F. (2d) 965 (C. C. A. 5).]

²² We do not understand that either petitioner or the sentencing judge questions that this is the effect of the language of the statute. They contend that despite its language the

It follows therefore that what Congress in essence authorized was not merely a suspension of service of the original sentence, leaving that sentence intact upon revocation of probation, but a complete revision of that sentence. As a sentence it is a "dead letter," as was aptly said in *Cornerz v. United States*, 69 F. (2d) 965, 966 (C. C. A. 5).²³ Its authority as a sentence is supplatable by what might be determined upon as the punishment pursuant to the exercise of the power contained in the revocation clause.²⁴ It is only after that determination that there results a judgment which is final as the measurement of punishment.²⁵ As was said in *United States v. Akerman*, 61 F. (2d)

statute should be construed as not permitting the "increase" in the term of imprisonment because of the double punishment clause. But the argument fails to realize the impact of the statute's language upon the finality of the imprisonment portion of the original sentence as the measure of punishment.

²³ See, also, *Greenhaus v. Sanford*, 35 F. Supp. 644, 646 (N. D. Ga.); *Scalia v. United States*, 62 F. (2d) 220, 223 (C. C. A. 1).

²⁴ See cases cited in notes 19, 20, 21, *infra*; see also *Pagano v. Bechly*, 241 Iowa 1294 (1930); *State v. Ensign*, 38 Ida. 539 (1924); *State v. Smith*, 173 Ind. 388 (1910); *State ex rel. Gentry v. Montgomery*, 317 Mo. 811 (1927).

²⁵ See *People ex rel. Pringle v. Livingston*, 135 Misc. 475, 477-478, 239 N. Y. S. 122 (1930); *People ex rel. Decker v. Page*, 125 Misc. 538, 540, 241 N. Y. S. 401 (1925); *People v. Fisher*, 237 Mich. 504 (1927); *In re Goetz*, 46 Cal. App. (2d) 848, 851 (1941); *State v. Ensign*, 38 Idaho 539, 544 (1924).

570, 571 (C. C. A. 5), "When probation was revoked and 'such sentence imposed as might originally have been imposed,' the provisions of the Probation Act were exhausted. The sentence then imposed was final in the same way that all criminal sentences were before that law was passed." If the final determination on revocation of probation results in a greater punishment than that originally pronounced, the "increase" is, of course, merely chimerical, since the first pronouncement was subject to modification upon non-compliance with the terms of probation and was thus only tentative or interlocutory as a declaration of punishment.²⁶

That Congress did not intend to draw a sharp distinction between a suspension of imposition of sentence and a suspension of execution of sentence is further indicated by the practical result which

²⁶ This is entirely consistent with the ruling of this Court in *Berman v. United States*, 302 U. S. 211. There the question was whether a sentence, the execution of which was suspended incident to the placing of the defendant on probation, was final *for the purpose of appeal*. This Court held that it was, under the test that a judgment "is final for the purpose of appeal when it terminates the litigation * * * on the merits" and "leaves nothing to be done but to enforce by execution what has been determined." A similar holding was made recently by this Court in *Korematsu v. United States*, No. 912, last Term, decided June 1, 1943, in respect of a probation order where imposition of a sentence was suspended. Indeed, the latter decision highlights the limited nature of the *Berman* decision as a ruling on finality, since the order in the *Korematsu* case was regarded for the purpose of appeal as the equivalent of a sentence.

would flow from observance of the distinction, and by the legislative background of the Act:

If such a distinction were to be made, the original sentence would be untouchable on revocation of probation, since only the suspension of its execution could be vacated. Consequently the court could not impose either a greater, the same, or even a lesser punishment than that originally pronounced. But it would not be at all trammelled as to the sentence which it could pronounce if it had merely suspended the imposition of sentence. It could, upon revocation of probation, without question impose any sentence which it might originally have rendered. The device of suspending execution would, consequently, be little used in the probationary scheme. The courts would inevitably turn to the expedient of suspending the imposition of sentence under which their discretion is not so "cabined, cribbed, confined." It is difficult to believe that under a law which should permit the greatest flexibility in administration to accomplish most effectively its aims, Congress intended any such divergent result to flow from a selection of one as contrasted with the other of the two forms of suspension of sentence.

²⁷ *Burns v. United States*, 287 U. S. 216, 220; *Scalia v. United States*, 62 F. (2d) 220, 223 (C. C. A. 1); *United States v. Antinori*, 59 F. (2d) 171, 172 (C. C. A. 5); *Reeves v. United States*, 35 F. (2d) 323, 325 (C. C. A. 8); *Nix v. James*, 7 F. (2d) 590, 592 (C. C. A. 9); *Archer v. Snook*, 10 F. (2d) 567, 568 (N. D. Ga.).

Indeed, that Congress intended to make no distinction between suspension of imposition and suspension of execution in the exercise of the revocation power is indicated by the House Report on the bill which became the Probation Act. In one place in that Report, No. 1377, 68th Cong., 2d Sess., it is stated that "In case of failure to observe these conditions [the conditions of probation], those on probation may be returned to the court *for sentence*" [Italics supplied], and in specifying the "principal provisions" of the bill the Report states in another place (p. 5):

SEC. 2. *Providing for terminating and revoking probation.*—It is important that probation be enforced, in order that it may be a real system of discipline and in order that society may be well protected. Hence it is provided that the probation officer may arrest without a warrant *and that the court may impose the penalty at any time during the probation period.* [Italics supplied.]

The present Act stands in distinct contrast, in this respect, to the measure passed by Congress in 1917 but pocket-vetoed by the President. In that measure only the power to suspend execution of sentence was conferred, and upon revocation the defendant could only be required "to serve the sentence or pay the fine originally imposed." See H. R. 20414, 64th Cong., 2d sess.; 54 Cong. Rec. 3637, 4373; see also Hearings be-

fore the Committee on the Judiciary, House of Representatives, 66th Cong., 2d sess., on H. R. 340, 1111, and 12036, March 9, 1920, pp. 5, 106-107, 112-113.

That Congress knowingly phrased the revocation clause so as to permit a new and even greater sentence is evidenced by another fact. As stated, the Act was "modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work" (*supra*, p. 18). In 1925 when the Federal act was passed, seven states had probation statutes authorizing suspension of both imposition and execution of sentence and revocation thereof.²⁸ The revocation clauses of all these, except the New York statute, provided that if imposition of sentence had been suspended, the court might impose sentence and if execution of sentence had been suspended, the original sentence was to be in full force and effect.²⁹ Congress did not choose, however, to incorporate this distinction into its own act. It turned for a model

²⁸ The statutes of two other states, Mississippi and Utah, authorized suspension of imposition or execution of sentence, but contained no revocation clause. See Miss. Laws, 1926, ch. 147; Utah Laws, 1923, ch. 74.

²⁹ See Cal. Stat. Penal Code, 1925, sec. 1203 (f); Idaho Code Ann. (1932), sec. 19-2505; Rev. Stats. of Maine (1916), c. 137, sec. 14; Mass. Gen. Laws (1921), c. 279, sec. 3; Va. Code Ann. (1936; 1940 Supp.), sec. 1922b; Wis. Stats. (1925), sec. 57.03. This type of revocation clause is the one most often found in the numerous state probation statutes which now permit suspension of imposition or execution of sentence, with probation. But see notes 30 and 31, *infra*, pp. 31-32.

instead to the broader revocatory power reflected in the New York statute. That statute at the time provided that after re-arresting the defendant the court might—

if sentence shall have been suspended, impose any sentence or make any commitment which might have been imposed or made at the time of conviction or may, if sentence shall have been imposed and execution of the whole or a part of the judgment suspended, revoke the order suspending execution of judgment and order executed the judgment or the part thereof the execution of which shall have been suspended or may modify the judgment so as to provide for the imposition of any punishment which might have been imposed at the time of conviction. [Cahill's Cons. Laws of N. Y., 1923, c. 41, sec. 2188.]

The revocation clause of the Federal Act is but a concise statement of this authorization.³⁰ which,

³⁰ The same conciseness is now reflected in the New York statute, which was amended in 1928 to read as follows: "The court may. * * * revoke the order suspending sentence or its execution and may impose such sentence or make such commitment as might have been made at the time of conviction." [N. Y. Laws, 1928, ch. 841.] Other state statutes contain revocation clauses which are probably similarly construable. They provide that upon revocation "the court * * * may make such orders as justice requires" (N. H. Rev. Laws (1942), ch. 379, sec. 14) and "the court * * * shall proceed to deal with the case as if there had been no probation or suspension of sentence" (N. C. Code Ann. (1939), sec. 4665 (4); S. C. Code (1942), sec. 1038-4).

under the New York statute, was held to make the prison term originally specified "but tentative" and "a vain thing" in case the court should thereafter desire to change it (*People ex rel. Decker v. Page*, 125 Misc. 538, 540, 211 N. Y. S. 401 (1925); see, also, *People ex rel. Pringle v. Livingston*, 135 Misc. 475, 476-477, 239 N. Y. S. 122 (1930); *People ex rel. Lehman v. Hunt*, 8 N. Y. S. (2d) 793, 255 App. Div. 931 (1938)). It should be noted also that under the New York statute in effect at the time this applied even though a fine was imposed and paid and the imprisonment portion of the sentence only was suspended (*People ex rel. Decker v. Page, supra*), which, of course, is our interpretation of the Federal statute.³¹

In sum, it follows that the Act permitted the very same result to be attained in this case upon revocation of probation as it would have if the petitioner had been required to pay the same fine

³¹ Three state probation statutes passed subsequent to the enactment of the Federal Probation Act are practically identical with it insofar as they authorize probation upon suspension of imposition or execution of sentence, imposition of a fine and probation, payment of a fine in one or several sums during probation, and, upon revocation of "probation or the suspension of sentence," the imposition of "any sentence which might originally have been imposed." See 4 Colo. Stats. Ann. (1935), ch. 140 (passed in 1931); Ind. Stats. Ann. (Burns 1933), secs. 9-2209, 9-2210, 9-2211 (passed in 1927); N. J. Stats. Ann. (1939), secs. 2:199-1, 2:199-2, 2:199-4 (passed in 1929).

as a condition of probation, and the imposition, rather than the execution, of a prison term had been suspended. In either case the court is authorized to give a prison term of three years under the authority to impose "any sentence which might originally have been imposed." The original declaration of prison sentence, unexecuted, is thus merely provisional.

II

THE PROBATION ACT, GIVEN THE CONSTRUCTION WHICH ITS LANGUAGE REQUIRES, DOES NOT VIOLATE THE DOUBLE PUNISHMENT CLAUSE

If, as we submit, our analysis of the Probation Act, is sound, there is no basis for the view of petitioner and the dissenting judge that double punishment resulted when, upon revocation of probation, the district court "increased" petitioner's term of imprisonment from two to three years.

Where, as here, a fine is imposed but execution of the prison sentence is suspended, the fine, when paid, cannot be increased if probation is violated, since that portion of the sentence has been fully executed. The Act, however, makes the unexecuted portion of the sentence, the imprisonment portion, merely tentative or interlocutory, and permits, upon revocation of probation, the imposition of a new sentence which may specify a longer term of imprisonment than that originally indicated. It is only when this new sentence is pro-

nounced that there is a final declaration of the punishment to be suffered, a judgment finally measuring the punishment. There is hence no *real* increase in punishment where, as in the instant case, the new sentence imposes a longer term of imprisonment. Giving the double punishment clause of the Fifth Amendment the broadest interpretation, certainly there cannot be double punishment until there has been a final determination of the punishment to be suffered and a court has then attempted to increase the punishment.³²

Our position assimilates, for constitutional purposes, the suspension of imposition and the suspension of execution of sentence under the Probation Act. This Court in the *Korematsu* case, No. 912, 1942 Term, observed "The difference to the probationer between imposition of sentence, followed by probation, as in the *Berman* case, and suspension of imposition of sentence, as in the instant case, is one of trifling degree." To make

³² It has been held that, at least in certain contingencies, the Fifth Amendment does not even prevent increases in sentences which purport to speak with finality or are "judgmental in character," to use the language of Associate Justice (now Mr. Justice) Rutledge in *Rowley v. Welch*, 114 F. (2d) 499, 503 (App. D. C.); see also *De Maggio v. Core*, 70 F. (2d) 840 (C. C. A. 2); *Hatem v. United States*, 42 F. (2d) 40 (C. C. A. 4), certiorari denied, 282 U. S. 887; *Jordan v. United States*, 60 F. (2d) 4, 6 (C. C. A. 4), certiorari denied, 287 U. S. 633; *Cisson v. United States*, 37 F. (2d) 330, 332 (C. C. A. 4); *Commonwealth v. Weymouth*, 2 Allen, 144 (Mass.), 79 Am. Dec. 776.

that trifling difference the touchstone of constitutional rights would be to "trivialize" (*O'Malley v. Woodrough*, 307 U. S. 277, 282) the great constitutional guarantee against suffering repeated prosecution or repeated punishment for the same offense.

Indeed, if an increase in the tentative declared punishment were invalid, grave doubt would be cast on the power to extend the period of probation, a power explicitly conferred by Section 2 (subject to a maximum of five years) and one which lies at the heart of the probationary process. Probation is a form of "ambulatory punishment," as this Court said in the *Korematsu* case, *supra*, and its extension after service thereof has begun would seem to be at least as substantial a change in sanctions as an increase in the declared term of imprisonment which has not commenced. In our view an extension of either is valid because in either event there has been no final declaration of punishment.

Neither petitioner nor the dissenting judge cites any decision involving the Probation Act which sustains his position. The decision upon which they principally rely is *Ex parte Lange*, 18 Wall. 163, particularly as interpreted in *United States v. Benz*, 282 U. S. 304, 307. The *Lange* case and the similar later case of *In re Bradley*, 318 U. S. 50, involved attempts to correct, through the medium of new and more severe sen-

tences, partially invalid sentences which were meant to be, and on their face were, final declarations of punishment, which the judges who imposed them intended should be executed, and which were in fact in valid part executed.²³

Since it was permissible and valid, under the Act, to have a partial execution of the original sentence in the case at bar through payment of the fine, the case is indistinguishable from *Moore v. United States*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664, and *Reimer v. Regan*, 104 F. (2d) 704, 705-706 (C. C. A. 9), certiorari denied, 308 U. S. 553. In the *Moore* case, Moore had been sentenced to two years' imprisonment but execution of the sentence had been suspended and Moore granted probation. Mr. Justice Van Devanter (then retired and sitting as a United States District Judge) later revoked probation because of its violation and sentenced Moore to seven years' imprisonment and a fine of \$300. The sentence was sustained on appeal. While the opinion of the circuit court of appeals does not in specific terms discuss Mr. Justice Van Devanter's power to increase the term of imprisonment, it does disclose that one of the questions presented to that court was "the jurisdiction of the District Court." But even if the validity of the increased sentence was

²³ Other authorities relied upon by petitioner involved the partial execution of sentences which were completely final in character.

not actually passed upon by the court, the question was a fundamental one, appearing upon the face of the record, and was argued in both the petition for a writ of certiorari (pp. 7-8, 13-17) and the Government's brief in reply (pp. 10-12). Nevertheless, this Court denied certiorari.

In *Remer v. Regan*, *supra*, in which this Court also denied certiorari, Remer's original two-year sentence on a count under which he was placed on probation was increased to three years upon revocation of probation. The circuit court of appeals specifically held that the three-year sentence was not void as in violation of the Fifth Amendment, stating that the suspension of the original sentence was valid, and that "an increase of sentence is expressly authorized" by the Probation Act and "is potentially a part of the original sentence" (p. 705). Cf. *People v. Roberts*, 136 Cal. App. 709 (1934).³¹

³¹ Such contrary expressions of opinion as there are almost invariably are based not on the language of the statute but on the fear that "increasing" the original sentence would conflict with the Constitution. See Attorney General's *Survey of Release Procedures*, Vol. I, *Digest of Federal and State Laws on Release Procedures*, p. 13; *ibid.* Vol. II, *Probation*, p. 334; Chappell, *Decisions Interpreting the Federal Probation Act* (1937), pp. 21-22. But if, as we submit, the original sentence is not final as a declaration of punishment, there is no basis for this fear. Where they attempt it, those who entertain the doubt have difficulty in explaining how the original sentence is so far final as the measurement of punishment that it may not be increased upon revocation of probation but may be modified by reducing it. The power to

These decisions reflect the spirit of the decisions of this Court which have declined to find in the former-jeopardy clause of the Constitution a barrier to sensible and equitable procedures in the administration of the criminal law. Thus, for example, a new trial may be had where a prior jury has disagreed (*Dreyer v. Illinois*, 187 U. S. 71), or where a prior jury was discharged for misconduct (*Simmons v. United States*, 142 U. S. 148); a defendant may be held for extradition after his discharge under a prior warrant of arrest therefor (*Collins v. Loisel*, 262 U. S. 426); and a greater sentence may be imposed following a defendant's appeal from a conviction (*Trono v. United States* 199 U. S. 521).

reduce the original sentence, because it is not a final determination of punishment, stems from the Act, just as much as the power to increase, and it is on that basis that reduction has been permitted. *United States v. Antonori*, 59 F. (2d) 171, 172 (C. C. A. 5). It is of no importance therefore that, upon the theory that the term has been extended by the Probation Act, a court might, in the absence of express language in the Act, have inherent power to reduce its sentence, upon revocation of probation, under the rule of *United States v. Benz*, 282 U. S. 304. Also, it is no answer to say that since the original sentence is sufficiently final for the purpose of appeal, it should be deemed sufficiently final for the purpose of the double punishment clause of the Fifth Amendment. As we have pointed out, such a sentence is final for the purpose of appeal simply because it terminates the litigation on the merits (note 26, *supra*, p. 27). It still may not be final as the measurement of punishment, and if it is not, as we submit, double punishment cannot result because later there is merely an "increase" as a matter of mathematics.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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OCTOBER 1943.

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SUPREME COURT OF THE UNITED STATES.

No. 19.—OCTOBER TERM, 1943.

Frank Roberts, Petitioner,	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Cir- cuit.
vs.		
The United States of America.		

[November 22, 1943.]

Mr. Justice BLACK delivered the opinion of the Court.

In April, 1938, petitioner pleaded guilty to a violation of 18 U. S. C. 409 and the District Court entered a judgment sentencing him to pay a fine of \$250 and to serve two years in a federal penitentiary. Acting under authority of the Probation Act¹ the court then suspended execution of the sentence conditioned upon payment of the fine, and ordered petitioner's release on probation for a five year period. The fine was paid and he was released. In June, 1942, the court after a hearing revoked the probation, set aside the original sentence of two years, and imposed a new sentence of three years. The Circuit Court of Appeals affirmed, 131 F. 2d 392. Certiorari was granted because of the importance of questions raised concerning administration of the Probation Act.

The power of the District Court to increase the sentence from two to three years is challenged on two grounds: (1) Properly interpreted the Probation Act does not authorize a sentence imposed before probation, the execution of which has been suspended, to be set aside and increased upon revocation of probation; (2) If construed to grant such power, the Act to that extent violates the prohibition against double jeopardy contained in the Fifth Amendment. We do not reach this second question.

If the authority exists in federal courts to suspend or to increase a sentence fixed by a valid judgment, it must be derived from the Probation Act. The government concedes that federal courts had no such power prior to passage of that Act.

¹ 43 Stat. 1259; 46 Stat. 503; 48 Stat. 256; 53 Stat. 1223, 1225; U. S. C. Title 18, §§ 724-728.

See *Ex parte United States*, 242 U. S. 27; *United States v. Mayer*, 235 U. S. 55; *Ex parte Lange*, 85 U. S. 163; *United States v. Benz*, 282 U. S. 304. In the instant case that part of the original judgment which suspended execution of the two-year sentence and released the petitioner on probation was authorized by the literal language of Section 1 of the Probation Act (U. S. C. Title 18, § 724) granting the District Court power "to suspend the execution of sentence and to place the defendant upon probation.

But before we can conclude that the Act authorized the District Court thereafter to increase the sentence imposed by the original judgment we must find in it a legislative grant of authority to do four things: revoke probation; revoke suspension of execution of the original sentence; set aside the original sentence; and enter a new judgment for a longer imprisonment.

We are asked by the government to find this legislative grant in Section 2 of the Act as amended (U. S. C. Title 18, § 725) a part of which is set out below.² It is clear that power to do the first two things, revoke the probation and the suspension of sentence, is expressly granted by Section 2. It is equally clear that power to do the third, set aside the original sentence, is not expressly granted. If we find this power we must resort to inference.

Except by strained construction we could not infer from the express grant of power to revoke probation or suspension of sentence the further power to set aside the original sentence. Neither probation nor suspension of execution rescinded the judgment sentencing petitioner to imprisonment;³ the one merely ordered that petitioner be released under the supervision of probation officials, the other that enforcement of his sentence be postponed. Upon their revocation, without further court action, the original sentence remained for execution as though it had never been suspended. Cf. *Miller v. Aderhold*, 288 U. S. 206, 211.

² "At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." 43 Stat. 1260; 48 Stat. 756.

³ Cf. *Pile v. United States*, 130 U. S. 280; *United States v. Weiss*, 28 F. Supp. 598, 599; *Pernatto v. United States*, 107 F. 2d 372; *Kriebel v. United States*, 10 F. 2d 762; *Ackerson v. United States*, 15 F. 2d 268, 269; *Moss v. United States*, 72 F. 2d 30, 32; *King v. Commonwealth*, 246 Mass. 57, 60; *Belden v. Hugo*, 88 Conn. 500, 504; *In re Hall*, 100 Vermont 197, 202.

² "At any time within the probation period the probation officer may arrest the probationer . . . or the court which has granted the probation may issue a warrant for his arrest. (and) such probationer, shall

If then the power to set aside and increase the prison term of the original sentence is to be inferred at all from Section 2, it must be drawn from the clause which empowers the court after revocation of the probation and the suspension of sentence to "impose any sentence which might originally have been imposed." It is undisputed in the instant case that the court could originally have imposed a three-year sentence. Therefore the existence of power to set aside the first judgment in order to increase the sentence would be a perfectly logical inference from the clause if it stood alone, because two valid sentences for the same conviction cannot coexist. But the clause cannot be read in isolation; it must be read in the context of the entire Act. And in the absence of compelling language we should not read into it an inferred grant of power which necessarily would bring it into irreconcilable conflict with other provisions of the Act.

To accept the government's interpretation of this clause would produce such a conflict. Section 1 of the Probation Act provides the procedural plan for release on probation. After judgment of guilt, the trial court is authorized "to suspend the imposition or execution of sentence and to place the defendant upon probation." (Italics supplied.) By this language Congress conferred upon the court a choice between imposing sentence before probation is awarded or after probation is revoked. In the first instance the defendant would be sentenced in open court to imprisonment for a definite period; in the second, he would be informed in open court that the imposition of sentence was being postponed. In both instances he then would be informed of his release on probation upon conditions fixed by the court. The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the defendant leaves the court with knowledge that a fixed sentence for a definite term of imprisonment hangs over him; under the second, he is made aware that no definite sentence has been imposed and that if his probation is revoked the court will at that time fix the term of his imprisonment. It is at once apparent that if we accept the government's interpretation this express distinction which Section 1 draws between the alternative methods of imposing sentence would be completely obliterated. In the words of the government, any sentence pronounced upon the defendant before his release on probation would be a "dead letter." Thus the

express power to suspend execution of sentence granted by Section 1 would, by an inference drawn from Section 2, be reduced to a meaningless formality. No persuasive reasons relating to congressional or administrative policy have been suggested to us which justify construing Section 2 in this manner.

The ten-year legislative history of the Probation Act strongly suggests that Congress intended to draw a sharp distinction between the power to suspend execution of a sentence and the alternative power to defer its imposition. The first probation legislation was passed by Congress in 1917 but failed to receive the President's signature. As originally introduced this bill provided only for the suspension of imposition of sentence.⁴ After extended hearings the Senate Judiciary Committee reported it with amendments including two which were intended to grant courts power to choose between suspending imposition and suspending execution.⁵ But when the bill finally passed both Houses the power to suspend imposition had been eliminated and only the power to suspend execution remained.⁶ Between 1917 and 1925, when the present Act was passed and approved by the President, the several congressional committees interested in probation legislation considered numerous bills. Some provided only for suspension of imposition, some only for suspension of execution, and some for either method as the court saw fit.⁷ During this period there were advocates of those bills which provided for the suspension of imposition of sentence, but others opposed such bills. Attorney General Palmer, belonging to the latter group, expressed his opposition to a bill which provided for the suspension of imposition, pointing out that, "The judge may also, in his discretion, terminate the probation at any time within the period specified and require the defendant to serve not a sentence which had been originally pronounced upon him, but a sentence to be pronounced at the time of the termination of the probation

⁴ Hearings before subcommittee of the Committee on the Judiciary, U. S. Senate, on S. 1092, 64th Cong., 1st Sess., March 25, 1916, pp. 5, 6.

⁵ Report No. 887, Senate Committee on the Judiciary, 64th Cong., 2nd Sess.

⁶ 54 Cong. Rec. 3637, 4373; Hearings before the House Committee on the Judiciary, 66th Cong., 2nd Sess., on H. R. 340, 1111 and 12036, March 9, 1920 pp. 106-107, 112-113.

⁷ Summaries of state legislation were inserted into the records of the committee hearings and many witnesses discussed such legislation. See, e.g., *Ibid.*, 123-130, 38-44. Like the bills before Congress, the state probation acts were not uniform in their treatment of suspension of sentence.

for the act contemplates that in granting probation a court suspends ~~even the imposition of a sentence~~. . . . The conferring of such powers upon judges would not, it seems to me, contribute to the proper and uniform administration of criminal justice."⁸ (Italics supplied.) In the end Congress declined to adopt one method of suspension to the exclusion of the other and instead granted the courts power to apply either method according to the circumstances of each individual case. From this compromise of the conflicting views on the proper method of suspension we may conclude that Congress indicated approval of the natural consequences of the application of each method. As understood by Attorney General Palmer one of these consequences was that when the method of suspension of execution was used the defendant could be required to serve only the sentence which had been originally pronounced upon him.

A construction of the Act to preserve the distinctive characteristics of the two methods of suspension is not inconsistent with the manner in which it has been enforced and administered. From the passage of the Act until 1940⁹ the Attorney General exercised supervision over administration of the Act.¹⁰ In 1930 the Attorney General in a carefully considered opinion reached the conclusion that if Congress had intended by Section 2 of the Probation Act "to create such an important power . . . [as that for which the government here contends] it would seem that more explicit language would have been used." 36 O. A. G. 186, 192. A comprehensive two-volume report by the Attorney General entitled "Survey of Release Procedures" published in 1939

⁸ *Ibid.*, 105.

⁹ In 1940 administration of the probation system was transferred to the Administrative Office of the United States Courts under the provisions of an Act passed August 7, 1939. 53 Stat. 1223, 1225.

¹⁰ The original Act required probation officers to "make such reports to the Attorney General as he may at any time require." 43 Stat. 1261. In June, 1925, three months after enactment of the law, the Attorney General sent to all United States District Judges a memorandum of suggestions in which he comprehensively discussed the duties of judges and probation officers and requested that monthly reports be made to him concerning the probation activities in each court. See 1925 Annual Reports and Proceedings of the National Probation Association, 227-230. In 1930 an amendment to the Probation Act stated that the Attorney General should "endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts." 46 Stat. 503, 504. See also 53 Stat. 1225.

adopted this interpretation of Section 2: "Where imposition of sentence was originally suspended and probation granted, and the probation and suspension are later revoked, it is plain that before the offender can be imprisoned imposition of sentence is necessary. And since the case reverts to its status at the time probation was granted, the court clearly is free to impose any sentence which might originally have been imposed." 18 U. S. C. §725 (1934). But where the court imposed sentence but suspended the execution of it, it would seem that when the suspension of execution is revoked the original sentence becomes operative. Significantly, the report further pointed out that "No case has been found wherein the court, upon revocation of suspension of execution, increased the original sentence."¹¹

So far as pointed out to us the present and two other cases are the only ones in which federal courts have, upon revocation of probation, increased a definite sentence which had been imposed upon an offender prior to his release on probation. Cf. *United States v. Moore*, 101 F. 2d 56; *Remer v. Regan*, 104 F. 2d 704. The *Moore* case was decided January 16, 1939, without discussion of the power of the court to increase the sentence. The *Regan* case was decided May 26, 1939, and the court pointed out that defendant apparently conceded that imposition of an increased sentence was authorized by the Probation Act. We have, therefore, an administration of the probation law from its passage in 1925 until 1939, in which the Attorney General not only assumed but expressly stated by official opinion that a definite sentence, execution of which had been suspended, could not be increased after the suspension had been revoked for breach of probation conditions; and in which the federal courts had apparently not undertaken to act contrary to the Attorney General's interpretation.

To construe the Probation Act as not permitting the increase of a definite term of imprisonment fixed by a prior valid sentence gives

¹¹ Attorney General's Survey of Release Procedures, Vol. I, p. 13. Asserting that there is a distinction between a decrease and an increase of sentence, the report further stated: "However, it has been held that when suspension of execution is revoked the court may modify the original sentence so as to decrease the term of imprisonment." *Ibid.* Two Circuit Courts of Appeals had construed the Act as authorizing in that circumstance a judgment which reduced the term of the original sentence. *United States v. Antinori* (C. C. A. 5), 59 F. 2d 171; *Sealia v. United States* (C. C. A. 1), 62 F. 2d 220.

full meaning and effect both to the first and second sections of the Act. In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of probation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See *Burns v. United States*, 287 U. S. 216. Thus Congress conferred upon the courts the power to decide in each case whether to impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence, the alternative to be adopted to depend upon the character and circumstances of the individual offender. All we now hold is that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 19.—OCTOBER TERM, 1943.

Frank Roberts, Petitioner,	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Cir- cuit.
vs.		
The United States of America.		

[November 22, 1943.]

Dissenting opinion of Mr. Justice FRANKFURTER, in which
the CHIEF JUSTICE and Mr. Justice REED concur.

The ~~penological~~ device of probation grew out of ~~the~~ realization
that ~~the practical application even of the humane notion of making~~ *to make*
the punishment fit the criminal ~~presupposes~~ *requires* wisdom seldom avail-
able immediately after conviction. Imposition of sentence at that
time is much too often an obligation to exercise caprice, and to
make convicted persons serve such a sentence is apt to make law
a collaborator in new anti-social consequences. Probation is an
experimental device serving both (the offender and society). It
adds the means for exercising wisely that discretion which, within
appropriate limits, is given to courts. The probation system was
devised to allow persons guilty of anti-social conduct to continue
at large but under appropriate safeguards. The hope of the
system is that the probationer will derive encouragement and
collaboration in his endeavors to remain in society and never
serve a day in prison. The fulfillment of that hope largely rests
on the efficacy of the probation system, and that depends on a
sufficient number of trained and skilful probation officers. Thus
the probation system is in effect a reliance on the future to reveal
treatment appropriate to the probationer. In the nature of things,
knowledge which may thus be gained is not generally available
when the moment for conventional sentencing arrives. Since
assessment of an appropriate punishment immediately upon con-
viction becomes very largely a judgment based on speculation,
the function of probation is to supplant such speculative judg-
ment by judgment based on experience. For this reason proba-
tion laws fix a tolerably long period of probation, as, for instance,
the five year period of the Federal Probation Act.

In view of all that led to the adoption of probation and the light its workings have cast, the imposition of a suspended term sentence is meaningless if indeed it does not contradict the central idea underlying probation. A convicted person who is given a term sentence and then placed on probation hopes never to spend a day in prison. The court returning the probationer to the community likewise assumes that the influence of probation will save the probationer from future imprisonment. To treat the pronouncement of a term sentence as a kind of bargain whereby the probationer knows that, no matter what, he cannot be put in prison beyond the term so named is to give a wholly unreal interpretation to the procedure. We certainly should not countenance the notion that a probationer has a vested interest in the original sentence nor encourage him to weigh the length of such a sentence against any advantages he may find in violating his probation. To bind the court to such a sentence is undesirable in its consequences and violative of the philosophy of probation. As we pointed out very recently, the difference to a probationer between imposition of sentence followed by probation and suspension of the imposition of sentence "is one of trifling degree." *Korematsu v. United States*, 319 U. S. 432, 435. The fact is that term sentences of which the execution is suspended are likely to be as full of vagaries and as unrelated to insight relevant to treatment for particular individuals, as are term sentences the execution of which is not suspended. The capricious nature of such defined sentences dominates all statistical and other evidence regarding conventional judicial sentencing, e. g., *Criminal Justice in Cleveland* (1922) 303 *et seq.* and particularly Tables 20 and 21, and *Ambard v. Attorney General for Trinidad and Tobago* [1936] A. C. 322, and has led to suggestions for more scientific methods of sentencing, see Smith, Alfred E., *Progressive Democracy* (1928) 209 *et seq.*; Warner and Cabot, *Judges and Law Reform* (1936) 156 *et seq.*; Cantor, *Crime and Society* (1939) 254 *et seq.*; Glueck, *Criminal Careers in Retrospect* (1943) c. XVII.

If the experience of the District Court for the Southern District of New York—the district having the heaviest volume of federal criminal prosecutions—is a fair guide, the imposition of sentence, is more frequently suspended than is its execution. The only practical result of the strained reading of the powers of

the district courts by the decision today may well lead trial judges generally to place probationers on probation without any tentative sentence. A construction which leads to such a merely formal result, one so easily defeated in practice, should be avoided unless the purpose, the text and the legislative history of the Act converge toward it. The policy of probation clearly counsels against it, and neither the words of the Act nor their legislative history contradict that policy. So far as it is significant on this phase, the legislative history looks against rather than for such an undesirable construction. In contrast to the present Act, the first measure passed by Congress conferred only the power to suspend execution of sentence and upon its revocation required the defendant "to serve the sentence . . . originally imposed". H. R. 20414, 64th Cong., 2d Sess. (1917). This enactment suffered a pocket veto. In reporting the present legislation to the House of Representatives, its Committee on the Judiciary explained that "In case of failure to observe these conditions [of probation], those on probation may be returned to the court for sentence." H. Report No. 1377, 68th Cong., 2d Sess., 2.

And the text of the legislation does not defeat this policy. Indubitably petitioner was arrested and brought before the court during his period of probation. In that event the statute is explicit in its direction that "the court may revoke the probation . . . and may impose any sentence which might originally have been imposed". The court having followed the mandate of the statute, it seems irrelevant and unimportant whether petitioner became a probationer either by a postponement of sentence or by a suspension of a sentence already imposed. We cannot say that the statute does not contemplate that the new sentence which it authorizes shall be effective. The obvious purpose is that it should become so either by superseding any sentence earlier imposed or by revoking the suspension of imposition of sentence if none was imposed. Such is the plain meaning and effect of the direction that upon the arrest of the probationer "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." In other words, suspension whether of the sentence or of its execution leaves a trial court free to commit the criminal to prison if he fails to meet the test of freedom during the probationary period.

It would be strange if the Constitution stood in the way of a system so designed for the humane treatment of offenders. To vest in courts the power of adjusting the consequences of criminal conduct to the character and capacity of an offender, as revealed by a testing period of probation, of course does not offend the safeguard of the Fifth Amendment against double punishment. By forbidding that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb", that Amendment guarded against the repetition of history by trying a man twice in a new and independent case when he already had been tried once, see Holmes, J., in *Kepner v. United States*, 195 U. S. 100, 134, or punishing him for an offense when he had already suffered the punishment for it. But to set a man at large after conviction on condition of his good behavior and on default of such condition to incarcerate him, is neither to try him twice nor to punish him twice. If Congress sees fit, as it has seen fit, to employ such a system of criminal justice there is nothing in the Constitution to hinder.